



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

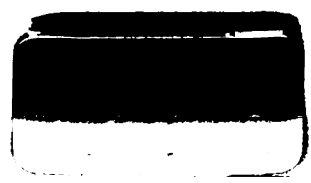
### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



WILLIAM P. HORN  
Imprints  
106 DECEMBER

GIFT







GIFT

LIBRARY  
OF THE  
UNIVERSITY  
OF  
CALIFORNIA





# ARCHITECT, OWNER AND BUILDER BEFORE THE LAW

A SUMMARY OF AMERICAN AND ENGLISH DECISIONS ON THE PRINCIPAL  
QUESTIONS RELATING TO BUILDING, AND THE EMPLOYMENT OF  
ARCHITECTS, WITH ABOUT EIGHT HUNDRED REFERENCES

INCLUDING ALSO

PRACTICAL SUGGESTIONS IN REGARD TO THE DRAWING OF BUILDING  
CONTRACTS, AND FORMS OF CONTRACT SUITED TO  
VARIOUS CIRCUMSTANCES

BY T. M. CLARK

FELLOW OF THE AMERICAN INSTITUTE OF ARCHITECTS

*New York*

THE MACMILLAN COMPANY

LONDON: MACMILLAN & CO., LTD.

1905

*All rights reserved*

*added copy*

COPYRIGHT, 1894,  
BY MACMILLAN AND CO.

GIFT

Printers  
S. J. PARKHILL & Co., BOSTON, U. S. A.



Tt 219  
C6

## PREFACE.

---

IT seems to be agreed among lawyers that no controversies, as a rule, are tried before courts with so little satisfaction to the litigants and their counsel as building cases. The lawyer finds them usually so technical as to require an amount of special study on his part quite disproportionate to their importance; while the parties to the controversy often suffer, or think they suffer, as much through what they regard as their counsel's inability to understand building matters as through what their counsel, with more reason, considers their own inexcusable ignorance and neglect of the legal principles relating to their business. These difficulties are, obviously, such as can be relieved, to a considerable extent, by means of a book presenting the most important decisions of the courts in building cases, with the principles on which the decisions are based. Such a book the author has endeavored to prepare; and, although the limitations of his legal learning have obliged him to quote, wherever possible, the actual words of judges, in statements of the law, instead of making assertions on his own authority, he has endeavored to make these quotations so comprehensive as to give the reader, whether lawyer or

layman, a more accurate idea of the judicial view of the various subjects than can usually be obtained from digests ; and, by searching through hundreds, perhaps thousands, of volumes of reports, he has tried to collect everything of importance that American jurisprudence has to offer in regard to building cases. As a result of this labor, the number of citations will be found very large ; but the author's experience has shown that counsel in building cases often find such references convenient, and he hopes that in this way, if in no other, his work may be found of use to a profession in which he counts many kind friends. Indeed, without their aid, and that of the officers of the Social Law Library of Boston, to whom he owes his sincerest thanks, this volume could hardly have been written ; and, while they must not be charged with any responsibility for its failings, they should certainly have a share of the credit for whatever merit it may be found to possess.

22 CONGRESS STREET, BOSTON, MASS., August 1, 1894.

# CONTENTS.

---

## PART I. THE ARCHITECT AND THE OWNER.

CHAPTER I. — THE ARCHITECT AND THE OWNER. — Why the Architect Should Know Something of Law. — The Architect's Employment. — Engagement for Services which Cannot be Completed Within a Year Must be in Writing. — What May be Taken as a Signature. — Contract Through Advertisement. — Strict Adherence Necessary to Terms of Competition. — A Contract by Advertisement is a Written Contract. — Revocation or Modification of Proposal by Advertisement. — Extension of Time. — Acceptance Must be Clear. — Incompatible Conditions. — Terms of Choice of a Design. — Volunteered Service. — The Value of Competitive Drawings.....Page 1

CHAPTER II. — THE ARCHITECT'S DUTIES TO HIS EMPLOYER. — The Architect's Position in Society. — The Skill and Care Required of Architects. — What are Reasonable Skill and Care. — Architect's Duty to be Ascertained by Evidence, not by Caprice of Jury. — Not Architect's Duty to Ascertain Accuracy of Work. — Dissenting Opinion. — Architect Does not Guarantee Perfection of Plan or Perfection of Building. — Relations of Commissioners and Architect. — Architect not to be Confounded with Builder. — Two More New York Cases. — What Does "See to it" Mean? — An Equerry as a Building Expert. — Builder Alone Responsible for his Own Misfeasance. — The A. I. A. Schedule in Court. — The Size of Boiler Flues. — Architect not Insurer of Perfection of Work. — Architect not a Mere Watchman. — Negligence of Architect a Question of Fact, not of Law. — The Measure of Damages for Negligence. — The Law in Iowa. — Compensation Cannot be Recovered from Two Persons for the Same Injury. — The Objection to the Law of Contributory Misfeasance. — The French Law of Architects' Responsibility. — The Position of Architects in the Napoleonic Period. — Special French Distinctions. — "Solidarity" of Responsibility Between Architect and Contractor.....Page 28

CHAPTER III. — THE ARCHITECT'S POSITION WHEN THE COST EXCEEDS THE LIMIT. — Architect to Carry out Employer's Wishes Under Certain Restrictions. — Architect is Bound to Know the Local Building Regulations. — Exigencies of Good Construction Paramount. — Architect Must not Consent to Doubtful Construction, Even at Owner's Order. — Owner's Wishes Must be Followed in Aesthetic Matters. — Where Limit of Cost is Incompatible with Effect Desired, Limit of Cost Rules. — Expenses Supplementary to Building. — What the Limit of Cost Ordinarily Covers. — Inevitable Uncertainty of Estimates. — What is Reasonable Compliance with Limit of Cost. — What Courts Think. — Architect's Fees not Properly a Part of Estimated Cost. — Estimates in Competition. — Conditional Acceptance of Plans.....	Page 64
CHAPTER IV. — THE RESPONSIBILITY OF THE ARCHITECT FOR HIS OWN WORK. — The Responsibility of the Architect, as Distinguished from that of the Builder. — The Architect's Responsibility to the Public. — The Architect's Responsibility for the Correctness of his Certificates. — Legal Principles Modifying Responsibility.....	Page 73
CHAPTER V. — THE ARCHITECT'S AUTHORITY AS AN EXPERT. — Extensive Authority of the Architect in his Own Province. — Authority of Superintendent Extends to Time When Work Shall be Done, as well as to Materials and Workmanship. — Architects as Expert Witnesses.....	Page 78
CHAPTER VI. — THE ARCHITECT AS AGENT FOR THE OWNER. — How far can the Architect Bind the Owner? — General Rule. — Implied Authority in Matters of Construction. — A French Instance. — Danger to Architects in Ordering Artistic Extras. — Special Authority Necessary for Purchasing Artistic Goods. — Deposit of Money by Owner in Architect's Hands Does not Make Him Owner's General Agent. — How Far Can an Architect go in Inspecting Concealed Work? — Architect has no Authority to Change Contract. — Contractor Cannot be Excused by Superintendent from Fulfilling his Agreement. — Certificates and Orders Must be in Form Specified by the Contract. — Architect Must not Consider Other Accounts Between Owner and Contractor. — Architect Cannot Give Certificates to Sub-contractors. — Unless Authorized by the Contract, Architect Cannot Employ Others to do Contractor's Work. — Architect Cannot Delegate his Authority. — Architect Must be Honest. — The Public Idea of Honorable Practice. — Accusation of Taking Illicit Commissions not Libellous. — Commissions from Contractors Cannot be Collected.....	Page 81
CHAPTER VII. — THE ARCHITECT'S CLAIM TO COMPENSATION. — The Methods of Employing Architects. — Salaried Architects. — The Wrongful Discharge of a Servant. — Two Theories of Damages. — Wages Earned in Other Employment to be Offset from Damages. — Person Employed Must Keep to the Terms of Employment. — Servant Must Show Intelligence. — The Claim to Pay for Extra Work.....	Page 98

CHAPTER VIII.—ARCHITECTS EMPLOYED ON COMMISSION.—Damages for Wrongful Dismissal, Full Commission, Less Expenses.—What is Included in the Architect's Service.—Plans Paid for by Owner.—Owner Must State Cost of Building for Computing Commission.—“Estimated Cost” Means Reasonable Cost.—The Five Per Cent Rule.—Schedule Fees Reasonable in Amount.—Schedule, as Evidence of Custom, not Favored in Courts.—Schedule Valid Where Known to Client.—What Notice Necessary.—Schedule Usages Valid for Non-members of the Institute.—Schedule Fees for Partial Service.—Question of Schedule Custom to be Raised with Caution.—Value of Time-book.—Schedule Rates Often Favor Client.—Fee for Partial Service Based on Agreed Fee for Full Service.—The Right of Architects to Mechanic's Lien.—Limit of Claim in Mechanic's Liens.....	Page 109
CHAPTER IX.—THE SICKNESS OR DEATH OF THE ARCHITECT.—Architect's Contract a Personal One.—Architect's Contract Entire.—Partial Compensation Recoverable in Case of Death.....	Page 126
CHAPTER X.—THE OWNERSHIP OF PLANS.—The Schedule Clause as to Ownership of Drawings.—The Case of the Drawings for the Houses of Parliament.—The French Law.....	Page 128

---

## PART II. THE ARCHITECT AND THE BUILDER.

CHAPTER XI.—THE ARCHITECT'S DUTIES TOWARD THE BUILDER.—Architect Must Act Fairly Toward the Builder.—Courts of Equity will Interfere in Case of Collusion.—Delay Through Architect's Fault.—Great Authority of Architect in England.....	Page 181
CHAPTER XII.—THE BUILDER'S DUTIES TOWARD THE ARCHITECT.—Builder Must Keep his Promises.—Importance of Satisfying the Architect.—Satisfaction.....	Page 187
CHAPTER XIII.—THE AUTHORITY OF THE ARCHITECT OVER THE BUILDER.—Authority of Architect Derived from Contract.—Extras Ordered by Architect.—Variation Between Detail and General Drawings.—Drawings as Written Orders.—Drawings not Equivalent to Written Order in Massachusetts.—Specification Controls Drawings.—Contract Based on Drawings Used for Estimating.—Discrepancies in Specifications.....	Page 142
CHAPTER XIV.—THE ARCHITECT'S CERTIFICATE.—The Certificates.—Architect Must Give Certificate if Requested.—Certificate Required for Extra as well as Contract Work.—Decisions Vary as to Necessity of Certificate.—Uncertainty of Deductions to be Made.—Final Certificate Really Provisional.—Cases of <i>Quantum Meruit</i> .—Waiver of Certificate.—Mere Occupancy not Waiver.....	Page 158



**PART III. THE BUILDER AND THE OWNER.**

<b>CHAPTER XV. — THE CONTRACT. — Relation Between Owner and Builder Fixed by the Contract. — Written, Oral and Implied Contracts. — Written Contracts. — Contracts for Employment. — Implied Contracts. . . . .</b>	<b>Page 180</b>
<b>CHAPTER XVI. — FORMAL CONTRACTS. — Proposal and Acceptance. — How Soon Proposal Must be Accepted. — Acceptance by Letter. — Acceptance by Telegraph. — Withdrawal of Offer. — Proposal Must be Accepted as Made. — General Conditions. — Contract by Acceptance. — Acceptance by Architect for Owner. — The Consideration. — Sealed Contracts. — Signatures. — Signature by One Party Only. — Party Signing is Bound. — Informal Acceptance of Proposal. — Delivery of Contract. . . . .</b>	<b>Page 183</b>
<b>CHAPTER XVII. — CONTRACTS WITH CORPORATIONS. — Difference Between Contracts with Corporations and Private Individuals. — Necessity for Corporate Seal. — Unbalanced Bids. — Extras in Public Contracts. — Public Contracts Must be Made with Due Formality. — Corporation Cannot Assume Contractor's Debts. — Public Corporation not Obligated to Carry Out its Contract. — Liability of Individual Officials. . . . .</b>	<b>Page 196</b>
<b>CHAPTER XVIII. — VERBAL AND WRITTEN CONTRACTS. — Written Contract Excludes Verbal Variations. — Draining Quicksand. — The Responsibility for the Failure of Legal Structures. — Parol Testimony Admissible to Supply Deficiencies in Written Contracts. . . . .</b>	<b>Page 208</b>
<b>CHAPTER XIX. — THE STATUTE OF FRAUDS AND LIMITATIONS. — Statute of Frauds of Maine. — Agreement not to be Performed Within a Year. — Sunday Contracts. . . . .</b>	<b>Page 214</b>
<b>CHAPTER XX. — MISREPRESENTATION OR MISTAKE. — Fraudulent Contract not Binding. — Contractor Should Give Notice on Discovering Mistake. — Contract May not be Entirely Vitiating by Fraud. . . . .</b>	<b>Page 218</b>
<b>CHAPTER XXI. — THE RIGHTS OF THE LOWEST BIDDER. — The Lowest Bidder not Necessarily Entitled to Contract. — The "Lowest Responsible Bidder." — The Pittsburgh Water Mains. — A Bid Less than the Reasonable Cost. — Character of Bidder May be Considered. — Bidders Must Comply with Conditions. — Fraudulent Bidding Dangerous. — Bidders not Entitled to Compensation. . . . .</b>	<b>Page 221</b>
<b>CHAPTER XXII. — THE INTERPRETATION OF CONTRACTS. — Entire and Divisible Contracts. — Payment on Entire Contract not Due Until Work is Completed. — Provision for Interim Payments does not Affect Entirety of Contract. — Divisibility of Contracts According to their Stipulations. — Wilful or Careless Departures from Contracts. — What Deviations are Unintentional and Inadvertent. — The Courts on Local Customs. — Plasterers' Measurement. — "Commencement." — "Erection." — "As Directed." — Earth Excavation. — "Not Less." — What is Implied in Regard to Materials. — Sand. — Old Materials. — Natural Bed. — "More or Less." — "Plastering." — Quantities. — "Specifications Hereto Annexed." — Warranty of Roof. — Orders. — Sub-contractors. . . . .</b>	<b>Page 228</b>

## CONTENTS.

ix

CHAPTER XXIII.—HOW CONTRACTS MAY BE MODIFIED.—Agreement or Waiver.—Supplementary Agreements.—Changes in Contracts with Corporations.—Contracts Under Seal.—Implied Agreements for Changes.—Extra Work in Emergencies.—Verbal Orders for Extras.—Waiver by Implication.—Responsibility for Variations.—Price for Extra Work.—Deductions from Contract.—The Contractor's Position Where Work is Abandoned.....	Page 278
CHAPTER XXIV.—THE ABANDONMENT OF CONTRACTS.—Death of Contractor.—Death of Owner.—Forfeited Contract May be Reinstated....	Page 296
CHAPTER XXV.—COMPLETION, ACCEPTANCE, DELAY AND FORFEITURE.—Occupancy does not imply Acceptance.—Damages for Delay.—Actual Damage Only Can be Recovered.—Forfeitures and Liquidated Damages.—Contract not Broken by Delay, if Builder Pays Penalty.—Waiver of One Stipulation of a Contract Does not Affect the Others.—Delay by Others' Fault.—Premiums.....	Page 311
CHAPTER XXVI.—RISK AND RESPONSIBILITY.—A Wall as a Wild Animal.....	Page 331
CHAPTER XXVII.—FORMS OF CONTRACT.—Digests of Mechanics' Lien Laws Unreliable.—General Conditions.—Transportation to be Paid for by Contractor.—Consent to Sub-letting.—Dismissal of Careless Workmen.—Contractor's Warranty.—Compliance with Local Regulations.—Responsibility for Care of Building.—Successive Dates for Completion.—The Formal Contract.—The Enforcement of Contracts.—The Difference Between Building a House, and Performing Work Shown on Drawings.—The Satisfaction of the Architect.—The Architect's Agency for the Owner.—Objections to Arbitration Clause.—Uncertainty in Contracts to be Avoided.—The Right to Order Alterations.—Verbal Orders of the Architect.—How to Guard Owners Against Employer's Liability.—Insurance Clause in Contracts.—Three Forms of Contract: First Form, Second Form, Third Form.....	Page 344

## ABBREVIATIONS.

---

- |   |   |
|---|---|
| <p>A. &amp; E., Adolphus &amp; Ellis' Reports, King's Bench.<br/> A. R. (Ontario), Appeal Reports, Ontario.<br/> Abb. Pr., Abbot's Practice Reports, New York.<br/> Aiken, Aiken's Vermont Reports.<br/> Ala., Alabama Reports.<br/> Ala. N. S., Alabama Reports, New Series.<br/> Alb. L. J., Albany Law Journal.<br/> Allen, Allen's Reports, Massachusetts.<br/> Alleyne, Alleyne's Select Cases, King's Bench.<br/> App. Cas., Appeal Cases.<br/> Ark., Arkansas Reports.<br/> <br/> B. &amp; Ald., Barnewall &amp; Alderson's Reports, King's Bench.<br/> B. &amp; S., Best &amp; Smith's Reports, Queen's Bench.<br/> Barb., Barbour's Supreme Court Reports, New York.<br/> Beav., Beavan's Reports, Chancery Cases.<br/> Bing., Bingham's Report, Common Pleas.<br/> Bosw., Bosworth's Reports, New York Superior Court.<br/> Bradw., Bradwell's Reports, Appellate Courts, Illinois.<br/> Bush, Bush's Reports, Kentucky.<br/> <br/> C. B., Common Bench Reports, Common Pleas.<br/> C. B. N. S., Common Bench Reports, New Series, Common Pleas.<br/> C. C. (Ohio), Ohio Circuit Court Reports.</p> | <p>C. E. Gr., C. E. Green, New Jersey Equity Reports.<br/> C. &amp; P., (Car. &amp; Payne), Carrington &amp; Payne's Nisi Prius Reports.<br/> C. P. (Upper Canada), Common Pleas Reports, Upper Canada.<br/> C. P. D., Common Pleas Division, Eng. Law Reports.<br/> Cal., California Reports.<br/> Camp., Campbell's Nisi Prius Reports.<br/> Cent. Rep., Central Reporter.<br/> Col., Colorado Reports.<br/> Conn., Connecticut Reports.<br/> Const., Constitutional Reports, South Carolina.<br/> Cranch, Cranch's Reports, U. S. Supreme Court.<br/> Ct. of Cl., Court of Claims Reports, U. S.<br/> Cush., Cushing's Reports, Massachusetts.<br/> <br/> D. C., District of Columbia Reports.<br/> Dalloz, Dalloz' Jurisprudence Générale.<br/> Daly, Daly's Reports, New York Common Pleas.<br/> Dana, Dana's Reports, Kentucky.<br/> Del., Delaware Reports.<br/> Del. Ch., Delaware Chancery Reports.<br/> Denio, Denio's Reports, New York.<br/> Dill., Dillon's U. S. Circuit Court Reports.<br/> Duer, Duer's Reports, New York Superior Court.<br/> Dutch., Dutcher's New Jersey Law Reports.<br/> Duvall, Duvall's Reports, Kentucky.</p> |
|---|---|

- E. & E., Ellis & Ellis' Reports, Queen's Bench.  
 E. D. Smith, E. D. Smith's Reports, New York Common Pleas.  
 East, East's King's Bench Reports.  
 El. & B., Ellis & Blackburn's Reports, Queen's Bench.  
 Eng. C. L., English Common Law Reports.  
 Eng. L. & E. R., English Law & Equity Reports.  
 Ex. D., Exchequer Division, English Law Reports.  
 Exch., Exchequer Reports.  
 F. & F., Foster & Finlason's Nisi Prius Reports.  
 Fed. Rep., Federal Reporter.  
 Fl., Fla., Florida Reports.  
 G. & J., Gill & Johnson's Maryland Reports.  
 Ga., Geo., Georgia Reports.  
 Giff., Giffard's Chancery Reports.  
 Gilm., Gilman's Reports, Illinois.  
 Gr., Green's New Jersey Equity Reports.  
 Gray, Gray's Reports, Massachusetts.  
 Gratt., Grattan's Virginia Reports.  
 H. L. Cas., House of Lords Cases.  
 H. & N., Hurlstone & Norman's Reports, Exchequer.  
 Hall, Hall's Reports, New York Superior Court.  
 Hill, Hill's Reports, New York.  
 Hilt., Hilton's Reports, New York Common Pleas.  
 Holt, Holt's King's Bench Reports.  
 How., Howard's Reports, U. S. Supreme Court.  
 How. Pr., Howard's Practice Reports, New York.  
 Hun, Hun's Supreme Court Reports, New York.  
 Ill., Illinois Reports.  
 Ill. App., Illinois Appellate Court Reports.  
 Ind., Indiana Reports.  
 J. & S., Jones & Spencer's New York Superior Court Reports.  
 John., Johns., Johnson's Reports, New York.  
 Jurist, The Jurist, (Eng.).  
 Kan., Kansas Reports.  
 Keyes, Keyes' Reports, New York.  
 Kernan, Kernan's Reports, New York.  
 L. J. C. P., Law Journal, Common Pleas Reports.  
 L. J. Ex., Law Journal, Exchequer Reports.  
 L. J. N. S., Law Journal, New Series.  
 L. J. Q. B., Law Journal, Queen's Bench.  
 L. R. App., Law Reports, Appeal Cases.  
 L. R. C. P., Law Reports, Common Pleas.  
 L. R. Ch., Law Reports, Chancery.  
 L. R. Eq., Law Reports, Equity.  
 L. T. N. S., Law Times Reports, New Series.  
 La., Louisiana Reports.  
 La. Ann., Louisiana Annual Reports.  
 Lea., Lea's Tennessee Reports.  
 M. & S., Maule & Selwyn's King's Bench Reports.  
 M. & W., Meeson & Welsby's Reports, Exchequer.  
 Mackey, Mackey's Reports, Supreme Court, Dist. of Columbia.  
 Mass., Massachusetts Reports.  
 McLean, McLean's Reports, U. S. Circuit Court.  
 McMullen, McMullen's South Carolina Reports.  
 Md., Maryland Reports.  
 Me., Maine Reports.  
 Met., Metcalf's Reports, Massachusetts.  
 Mich., Michigan Reports.  
 Minn., Minnesota Reports.  
 Miss., Mississippi Reports.  
 Mo., Missouri Reports.  
 Mo. App., Missouri Appeal Reports.  
 Mont., Montana Reports.  
 Mood. & Rob., Moody & Robinson's Nisi Prius Reports.  
 N. C., North Carolina Reports.  
 N. H., New Hampshire Reports.  
 N. Y., New York Reports.  
 N. Y. App., New York Court of Appeals Decisions.  
 N. Y. P. R., New York Practice Reports.  
 N. Y. Sup. Ct., New York Superior Court Reports.  
 N. Y. Supp., New York Supplement.  
 Neb., Nebraska Reports.  
 Nev., Nevada Reports.

xii     *ARCHITECT, OWNER AND BUILDER BEFORE THE LAW.*

- |   |   |
|---|---|
| Ohio, Ohio Reports.                                   | Tenn., Tennessee Reports.                       |
| O. S., Ohio State Reports.                            | Tex., Texas Reports.                            |
| Otto, Otto's U. S. Supreme Court Reports.             | U. S., United States Reports.                   |
| P. D., Law Reports, Probate Division.                 | Va., Virginia Reports.                          |
| Paige, Paige's New York Chancery Reports.             | Ves., Vesey Senior, Chancery Reports.           |
| Pa., Penn., Pennsylvania Reports.                     | Vr., Vroom's New Jersey Law Reports.            |
| Penn. St., Pennsylvania State Reports.                | Vt., Vermont Reports.                           |
| Pet., Peters' U. S. Supreme Court Reports.            | W. R., Weekly Reporter.                         |
| Phila., Philadelphia Reports.                         | W. Va., West Virginia Reports.                  |
| Pick., Pickering's Reports, Massachusetts.            | Wall., Wallace's Reports, U. S. Supreme Court.  |
| Q. B., Queen's Bench Reports.                         | Ware, Ware's Reports, U. S. District Court.     |
| Q. B. Div., Queen's Bench Division, Eng. Law Reports. | Wend., Wendell's Reports, New York.             |
| R. I., Rhode Island Reports.                          | Wheat., Wheaton's Reports, U. S. Supreme Court. |
| Sandf., Sandford's Reports, New York Superior Court.  | Wis., Wisconsin Reports.                        |
| Scam., Scammon's Illinois Reports.                    | Wkly. Dig., Weekly Digest.                      |
| Sm. L. C., Smith's Leading Cases.                     | Yeates, Yeates' Pennsylvania Reports.           |
| T. R., Term Reports, King's Bench.                    | Zab., Zabriskie's New Jersey Law Reports.       |
| Taunt., Taunton's Common Pleas Reports.               |   |



## TABLE OF CASES CITED.

<i>Abbey vs. Chase</i> , 6 Cush. 56.....	205	<i>Baasen vs. Baehle</i> , 7 Wis. 516.....	173
<i>Ada St. M. E. Church vs. Garnsey</i> , 66 Ill. 132.....	72	<i>Badders vs. Denio</i> , 88 Ala. 367.....	316
<i>Adams vs. Boston Iron Co.</i> , 10 Gray, 495.	310	<i>Badger vs. Kerber</i> , 61 Ill. 328.....	162
<i>Adams vs. Cosby</i> , 48 Ind. 153.....	295, 307	<i>Bagley vs. Peddie</i> , 5 Sandf. 192.....	319
<i>Adams vs. Lindsell</i> , 1 B. & Ald. 681...	184	<i>Baird vs. Tolliver</i> , 6 Humph. 186.....	319
<i>Adams vs. Mayor</i> , 4 Duer, 295.....	159	<i>Baldwin vs. Bennett</i> , 4 Cal. 392.....	100
<i>Adams vs. Nichols</i> , 19 Pick. 275.....	332	<i>Bank of Columbia vs. Patterson</i> , 7 Cranch, 305.....	197, 206
<i>Adams Express Co. vs. Egbert</i> , 36 Penn. St. 380.....	26	<i>Bank vs. Gries</i> , 35 Penn. 423.....	121
<i>Ahern vs. Boyce</i> , 19 Mo. App. 652..	83, 298	<i>Bank of Metropolis vs. Gutschlick</i> , 14 Pet. 19.....	206
<i>Alger vs. Vanderpoel</i> , 34 J. & S. 161...	294	<i>Bannister vs. Patty</i> , 35 Wis. 316..	172, 178
<i>Allamon vs. Mayor</i> , 43 Barb. 33.....	301	<i>Barber vs. Rose</i> , 5 Hill, 78 .....	322
<i>Allen vs. Bowman</i> , 7 Mo. App. 29.....	25	<i>Barlow vs. Gray</i> , 57 Mich. 623.....	197
<i>Allen vs. McKibbin</i> , 5 Mich. 449..	127, 244	<i>Barney vs. Giles</i> , 120 Ill. 154.....	159, 171
<i>Ames vs. Dyer</i> , 41 Me. 397.....	125	<i>Baron de W. vs. Mellier</i> , 16 L. R. Eq. 554.....	175
<i>Anderson vs. Meislahn</i> , 12 Daly, 149..	172, 264	<i>Bartlett vs. Stanchfield</i> , 148 Mass. 394..	280
<i>Andrews vs. Durant</i> , 11 N. Y. 35.....	332	<i>Barton vs. Hermann</i> , 11 Abb. Pr. 379. (N. S.).....	163, 173, 179
<i>Andrews vs. Montgomery</i> , 19 Johns. 205.	309	<i>Bass vs. Board</i> , 115 Ind. 234.....	83, 203
<i>Archard vs. Horner</i> , 3 Car. & Payne, 349.....	104	<i>Bassford vs. Oelrichs</i> , 40 Hun. 637....	141
<i>Archer vs. Commissioners</i> , 3 Ind. 501..	203	<i>Bast vs. Leonard</i> , 15 Minn. 304.....	277
<i>Armfield vs. Nash</i> , 31 Miss. 361.....	104	<i>Bassey vs. Ambrose</i> , 28 Mo. 39.....	319
<i>Asylum vs. Johnson</i> , 43 Me. 180.....	203	<i>Batchelor vs. Kirkbride</i> , 27 Fed. Rep 899.....	170
<i>Atkins vs. Barnstable</i> , 97 Mass. 428..	174	<i>Batterbury vs. Vyse</i> , 32 L. J. Ex. 177..	170
<i>Atkins vs. Van Buren</i> , 77 Ind. 447....	105	<i>Baum vs. Covert</i> , 62 Miss. 113.....	318
<i>Atlee vs. Fisk</i> , 75 Mo. 100.....	96	<i>Bentley vs. Davidson</i> , 74 Wis. 420....	172
<i>Austin vs. Keating</i> , 21 Mo. App. 30....	298	<i>Belt vs. Cook's, etc.</i> , 3 Cranch, 666...	285
<i>Austin vs. Wohler</i> , 5 Bradw. 300.....	323	<i>Bentley vs. State</i> , 73 Wis. 416.....	342
		<i>Benton Co. vs. Patrick</i> , 54 Miss. 240..	83
		<i>Bergen vs. N. Orleans</i> , 35 La. 523.....	300
<i>B. &amp; O. R. R. vs. Polly</i> , 14 Gratt. 447..	171	<i>Bigler vs. Mayor</i> , 9 Hun. 253.....	312
<i>B. &amp; O. R. R. vs. Resley</i> , 7 Md. 297....	171	<i>Bimbauer vs. Gleason</i> , 48 Hun. 614....	294

xiv ARCHITECT, OWNER AND BUILDER BEFORE THE LAW.

<p> <i>Birby vs. Williamson</i>, 25 Minn. 481... 242  <i>Blair vs. La Hire</i>, 127 Mass. 518... 100  <i>Blake vs. Cole</i>, 22 Pick. 97... 216  <i>Blakeslee vs. Holt</i>, 22 Conn. 228... 257  <i>Blanding vs. Sargent</i>, 38 N. H. 239... 216  <i>Blethen vs. Blake</i>, 44 Cal. 117... 178  <i>Bliss vs. Smith</i>, 34 Beav. 508... 134  <i>Blood vs. Wilson</i>, 141 Mass. 25... 258  <i>Bloodgood vs. Ingoldsby</i>, 1 Hilt. 388.  .....159, 179  <i>Blount vs. Guthrie</i>, 99 N. C. 93... 182  <i>Blythe vs. Poultney</i>, 31 Cal. 233... 329  <i>Board vs. Byrne</i>, 67 Ind. 21... 83, 284  <i>Board vs. Hill</i>, 122 Ind. 215... 83  <i>Boettler vs. Tendick</i>, 73 Tex. 488... 161  <i>Bolles vs. Sachs</i>, 37 Minn. 315... 105  <i>Bonesteel vs. Mayor</i>, 22 N. Y. 162... 88  <i>Bond vs. Newark</i>, 4 C. E. Gr. 376... 89, 165  <i>Bonnet vs. Glattfeldt</i>, 120 Ill. 166... 300  <i>Boody vs. R. &amp; B. R. R.</i>, 24 Vt. 660... 308  <i>Booge vs. Pac. R. R.</i>, 33 Mo. 212... 104  <i>Boswell vs. Laird</i>, 8 Cal. 469... 74  <i>Bourdais et Davioud vs. Cannes</i>, Dal-  loz, 1885, 8-4... 71  <i>Bouton vs. Supervisors</i>, 84 Ill. 384... 91  <i>Bowery Nat. Bank vs. Mayor</i>, 63 N. Y.  336... 169  <i>Boyle vs. Desenberg</i>, 74 Mich. 79... 227  <i>Bozarth vs. Dudley</i>, 15 Vr. 304...  .....250, 291, 297, 316  <i>Brackett vs. Lubke</i>, 4 Allen. 138... 338  <i>Bradstreet vs. Baker</i>, 14 R. I. 546... 319  <i>Brady vs. Mayor</i>, 18 N. Y. Pr. Rep. 343... 200  <i>Bragdon vs. Metrop. R. R.</i>, 2 App.  Cas. 691... 184  <i>Brechisen vs. Coffey</i>, 15 Mo. App. 80... 186  <i>Brigham vs. Hawley</i>, 17 Ill. 38... 230  <i>Bristol vs. Tracy</i>, 21 Barb. 236... 287  <i>Britton vs. Phillips</i>, 24 N. Y. Sup. Ct.  111... 185  <i>Brockway vs. Allen</i>, 17 Wend. 40... 206  <i>Bronson vs. Gleason</i>, 7 Barb. 472... 195  <i>Brown vs. Foster</i>, 113 Mass. 136... 140  <i>Brown vs. Strimple</i>, 21 Mo. App. 338... 212  <i>Brown vs. Wabash</i>, 18 Mo. App. 568... 193  <i>Brown vs. Webster</i>, 38 N. Y. 187... 229  <i>Brumby vs. Smith</i>, 3 Ala. (N. S.) 123... 332  <i>Brunsdon vs. Beresford</i>, 1 C &amp; E. 125... 172  <i>Bryant vs. Stillwell</i>, 24 Penn. St. 314... 286  <i>Burch vs. New Lindell</i>, 7 Mo. App. 583... 194  <i>Burke vs. Dunbar</i>, 128 Mass. 499... 340  <i>Burke vs. Kansas City</i>, 34 Mo. App.  570... 87  <i>Burns vs. Dillon</i>, 16 W'kly Dig. 368... 341 </p>	<p> <i>Butler vs. Tucker</i>, 24 Wend. 441... 173  <i>Butts vs. Huntley</i>, 1 Scam. 410... 231, 299  <i>Byrne vs. Sisters</i>, 16 Va. 213... 172  <i>Byrne vs. Van Tienhoven</i>, 50 P. D.  344-8... 184    <i>Callmeyer vs. Mayor</i>, 83 N. Y. 116... 267  <i>Campbell vs. Brackenridge</i>, 8 Ind. 471... 203  <i>Campbell vs. Day</i>, 80 Ill. 363... 92  <i>Campbell vs. Gates</i>, 10 Penn. St. 483... 290  <i>Cannon vs. Wildman</i>, 28 Conn. 372... 261  <i>Carlisle vs. Campbell</i>, 76 Ala. 247... 193  <i>Carpenter vs. I. N. Bank</i>, 119 Ill. 352... 193  <i>Cassation</i>, 15 juin, 1863... 60  <i>Cassidy vs. Lefevre</i>, 45 N. Y. 562... 299  <i>Castagnino vs. Balletta</i>, 21 Cal. 1097... 308  <i>Catlett vs. Tr. M. E. Church</i>, 62 Ind.  365... 217  <i>Cent. Mil. Co. vs. Spruck</i>, 24 Ill. 587... 175  <i>Chamberlain vs. McAllister</i>, 6 Dana,  352... 104  <i>Champlin vs. Rowley</i>, 13 Wend. 258... 234  <i>Chapman vs. Deane</i>, 34 Mich. 375... 300  <i>Chapman vs. Lowell</i>, 4 Cush. 878... 78  <i>Chicago vs. Sexton</i>, 115 Ill. 230... 230  <i>Chicago vs. Shober</i>, 6 Bradw. 560... 201  <i>Chicago vs. Tilley</i>, 13 Otto, 146... 119  <i>Chiddick vs. Marsh</i>, 1 Zab. 434... 319  <i>Chiles vs. Belleville</i>, 68 Ill. 123... 99  <i>Ch. of Com. vs. Sollitt</i>, 43 Ill. 519... 326  <i>Chism vs. Schipper</i>, 22 Vr. 1... 168  <i>Clark vs. Gilbert</i>, 26 N. Y. 279... 127  <i>Clark vs. Marsiglia</i>, 1 Denio, 317... 104  <i>Clark vs. Mayor</i>, 4 N. Y. 338... 297, 298  <i>Clark vs. Pendleton</i>, 20 Conn. 495... 216  <i>Clark vs. Pope</i>, 70 Ill. 128...  .....138, 175, 178, 288, 342  <i>Clark vs. Watson</i>, 114 Eng. C. L. 278...  .....140, 170, 174  <i>Cleary vs. Sohler</i>, 120 Mass. 310... 322  <i>Clifford vs. Richardson</i>, 18 Vt. 620... 327  <i>Coeys vs. Lehmann</i>, 79 Ill. 173...  .....171, 195, 208, 316  <i>Cohen vs. Stein</i>, 61 Wis. 508... 305  <i>Colburn vs. Woodworth</i>, 31 Barb. 881... 103  <i>Cole vs. Smith</i>, 4 Ind. 79... 127  <i>Collins vs. Money</i>, 4 Miss. 11... 265  <i>Colwell vs. Lawrence</i>, 36 N. Y. 306... 320  <i>Commissioners vs. Mitchell</i>, 82 Penn.  343... 222, 223, 224  <i>Commissioners vs. Motherwell</i>, 123 Ind.  364... 82 </p>
---	---

## TABLE OF CASES CITED.

xv

Commonwealth vs. Squire, 1 Met. 258..	262	Druiding vs. Lyon, 7 Mo. App. 199....	25
Commune de Colombier-Saugniere vs. Duchez et Savoye, Dalloz, 1883, 3-92.....	83	Drummond vs. Burrell, 15 Wend. 307..	4
Condon vs. Jersey City, 14 Vr. 452. 147, 282		Dryer vs. Lewis, 57 Ala. 550.....	126
Connors vs. Hennessy, 112 Mass. 96....	338	Dubois vs. Canal Co., 4 Wend. 290....	299
Cook Co. vs. Harms, 108 Ill. 151.....		Duffield vs. Johnston, 96 N. Y. 369....	275
..... 170, 308, 312		Dugan vs. Anderson, 36 Md. 567.....	151
Cook vs. McCabe, 53 Wis. 250.....	332	Dull vs. Bramhall, 43 Ill. 364.....	110
Cook vs. Murphy, 70 Ill. 96.....	280	Dunlap vs. Higgins, 1 H. L. Cas. 387-400.....	184
Cooper vs. Langdon, 9 M. & W. 60.. 88, 144		Dunn vs. Johnson, 33 Ind. 54.....	300
Costansin vs. Duperche, Dalloz, 1874, 1-285.....	61	Dunton vs. Chamberlain, 1 Bradw. 361. 16	
Cox vs. McLaughlin, 54 Cal. 605.....	800	Dwight vs. Ludlow, 128 Mass. 280....	186
Crabtree vs. Hagersleigh, 25 Ill. 233... 100		Dyer vs. Jones, 8 Vt. 205.....	258
Crane vs. Knubel, 43 N. Y. Pr. Rep. 389. 316			
Crumlech vs. Wilmington R. R. 5 Del. Ch. 270.....	179	Eaton vs. School Dist., 23 Wis. 374....	332
Culbertson vs. Ellis, 6 McLean, 248... 310		Eccles vs. Darragh, 48 N. Y. Sup. Ct. 506.....	277
Curry vs. Larer, 7 Penn. St. 470.... 319		Eggleston vs. Wagner, 46 Mich. 610....	186
Cutter vs. Powell, 2 Sm. L. C. 48..... 104		Ehrlich vs. Aetna, 15 Mo. App. 552; 88 Mo. 249.....	298
		Eichelberger vs. Miller, 20 Md. 334....	336
Dalloz, 1849, 2-171.....	129	Eigemann vs. Board, 82 Ind. 413... 203, 289	
Dalloz, 1871, 2-83.....	129	Elderton vs. Emmens, 6 C. B. 160, 187. 99	
Damhorst vs. Mo. Pac. R. R., 82 Mo. App. 350.....	77	Ellicott vs. Peterson, 4 Md. 476.....	216
Damon vs. Granby, 2 Pick. 345.....	205	Elliott vs. Caldwell, 43 Minn. 357.....	243
Dana vs. Short, 81 Ill. 468.....	103	Ellis vs. Abell, 10 A. R. 226. (Ontario). 21	
Daniels vs. Newton, 114 Mass. 530-8... 99		Ellis vs. Hamlen, 3 Taunt. 52.... 234, 270	
Daniels vs. Mosher, 2 Mich. 183..... 79		Ely vs. Ely, 80 Ill. 240.....	173
Davis vs. Freeman, 10 Mich. 188.....	320	England vs. Davidson, 11 A. & E. 856.. 18	
DeKay vs. Bliss, 42 Hun. 659.....	261	Ericsson vs. Brown, 38 Barb. 391.....	125
Delacroix vs. Bulkley, 13 Wend. 71... 280		Esmonde vs. Van Benschoten, 12 Barb. 366.....	322
Delafield vs. State, 26 Wend. 238.... 201		Estep vs. Fenton, 66 Ill. 467.....	313
Dement vs. Rokker, 26 Ill. 174.....	202	Esty vs. Aldrich, 46 N. H. 128.....	216
Denton vs. Atchison, 34 Kan. 438.....	243	Evans vs. Ch. & R. I. R. R., 26 Ill. 189. ....	290, 299
Dermott vs. Jones, 2 Wall. 9..... 287, 332		Everroad vs. Schwartzkopf, 123 Ind. 35.....	287
Devlin vs. Mayor, 63 N. Y. 8.....	300	Everson vs. Power, 89 N. Y. 527.....	99
Dewitt vs. Barley, 9 N. Y. 371.....	79	Ewing vs. Directors, 2 Bradw. 458....	99
Dickinson vs. Po'keepsie, 75 N. Y. 65. 77, 263		Ewing vs. Fiedler, 30 Bradw. 202....	175
Dingley vs. Greene, 54 Cal. 833.....	173	Eyerman vs. Mt. Sinai, 61 Mo. 489....	258
Dinsmore vs. Livingston, 60 Mo. 241... .. 174, 307		Eyster vs. Parrott, 83 Ill. 517.....	322
Dist. Columbia vs. Gallaher, 124 U. S. 505.....	152		
Dobbins vs. Higgins, 78 Ill. 440.....	230	Fahy vs. North, 19 Barb. 341.....	127
Dobson vs. Hudson, 1 C. B. N. S. 652.. 174		Fairbanks vs. Meyers, 98 Ind. 92.....	194
Dodge vs. McDonnell, 14 Wis. 553.... 85		Fairfield vs. Jeffreys, 68 Ind. 578.....	299
Donlin vs. Daegling, 80 Ill. 608.....	211	Fallon vs. Lawler, 102 N. Y. 228.....	309
Downey vs. O'Donnell, 92 Ill. 559.... 173		Falls Mfg. Co. vs. Broderick, 12 Mo. App. 378.....	186
Downey vs. O'Donnell, 86 Ill. 49.....	161		
Doyle vs. Halpin, 83 J. & S. 352.....	172		

Farebrother vs. Simmons, 5 B. & Ald. 333.....	193	Given vs. Waggoner, 38 Mo. 297.....	183
Farnham vs. Ross, 2 Hall, 167.....	304, 321	Glacius vs. Black, 50 N. Y. 145.....	
Farquhar vs. Brown, 132 Mass. 340.....	274	.....	140, 165, 312, 315
Ferguson vs. Davis, 65 Mich. 678.....	275	Goddard vs. Barnard, 16 Gray, 205.....	253
Fetz vs. Butterfield, 54 Wis. 242.....	171	Goodman vs. Pocock, 15 Q. B. 578.....	10-
Fewing vs. Tisdall, 1 Exch. R. 295.....	104	Gordon vs. Brewster, 7 Wis. 355.....	1
Fildew vs. Besley, 42 Mich. 100.....	337	Gorham vs. Gross, 125 Mass. 232.....	f
Finney vs. Condon, 86 Ill. 78.....	161	Gore vs. Island City, 24 Pa. 521.....	f
Fireproof Bldg. Co. vs. First N. Bk., 54 N. Y. Sup. Ct. 511.....	276	Graveson vs. Tobey, 75 Ill. 540.....	
First C. Church vs. Walrath, 27 Mich. 232.....	320	Gray vs. James, 128 Mass. 110.....	
Fisk vs. Gray, 11 Allen, 132.....	319	Gray vs. Pullen, 5 B. & S. 970.....	
Fitzgerald vs. Beers, 31 Mo. App. 356.....	276	Green vs. Haines, 1 Hilt. 254.....	
Fitzgerald vs. Hayward, 60 Mo. 516.....	299	Green vs. Jackson, 66 Georgia, 250.....	
Fitzpatrick vs. Cottingham, 14 Wis. 219.....	319	Gregg vs. Dunn, 38 Mo. App. 283.....	297,
Fitzsimmons vs. Christian Brothers, 81 Mo. 37.....	259	Griffin vs. Culver, 16 N. Y. 489.....	
Fleischmann vs. Miller, 38 Mo. App. 177.....	305	Grossman vs. Bonn, 5 Stud. 43.....	
Fleckner vs. Bank of U. S., 8 Wheat. 338.....	197	Guerin vs. Rodwell, 8 Vr. 71.....	
Fleury-Boisson vs. Juguot et Senetaire, Dalloz, 1884, 2-132.....	62		
Flood vs. Mitchell, 68 N. Y. 507.....	316	Hadley vs. Barendale, 9 Exch. 341.....	
Folliott vs. Hunt, 21 Ill. 654.....	231, 299	Haight vs. Sahler, 30 Barb. 218.....	
Folsom vs. McDonough, 6 Cush. 208.....	321	Hall vs. Bennett, 48 N. Y. Sup. Ct. 302.....	
Ford vs. U. S., 17 Ct. of Cl. 60.....	281	Halleck vs. Com. Ins. Co., 2 Dutch. 268; 3 Dutch. 645.....	1
Forsyth vs. Hooper, 11 Allen, 419.....	338	Hamilton vs. Scully, 118 Ill. 192.....	3
Foushee vs. Grigsby, 12 Bush. 78.....	125	Hamlin vs. Race, 78 Ill. 422.....	344
Fowler vs. Armour, 24 Ala. 199.....	104	Hammond vs. Miller, 2 Mackey, 14.....	
Fowler vs. Deakman, 84 Ill. 180.....	172, 323	Hampson vs. Lewis, 49 Md. 178.....	
Fox vs. Harding, 7 Cush. 516.....	273	Hanley vs. Walker, 79 Mich. 607.....	1"
Fox vs. Turner, 1 Bradw. 153.....	184, 186	Harder vs. Commissioners, 97.....	
Fullam vs. West Brookfield, 9 Allen, 1.....	205	Harmony vs. Bingham, 12 N.....	
Fuller vs. Little, 61 Ill. 1.....	99	Harris Case, 7 L. R. Ch. 537.....	
Furman vs. Parke, 1 Zab. 810.....	17	Harris vs. Panama R. R., 32 N.....	19
		Hart vs. Ryan, 6 N. Y. Supp. 921.....	341
Gallagher vs. Nichols, 60 N. Y. 438.....	306	Hartley vs. Harman, 11 A. & E. 798.....	103
Galyon vs. Ketchon, 85 Tenn. 55.....	337	Hartupee vs. City, 97 Penn. St. 107, 164, 316	
Gandell vs. Pontigny, 4 Camp. 375.....	104	Haslack vs. Meyers, 2 Dutch. 284.....	230
Gauss vs. Hussmann, 21 Mo. App. 343.....	308	Hastings vs. Aiken, 1 Gray, 163.....	262
Gibbons vs. U. S., 15 Ct. of Cl. 174; 109 U. S. 200.....	338	Haughwout vs. Boisaubin, 3 C. E. Gr 315.....	184
Gibson vs. Cranage, 39 Mich. 49.....	140	Haydenville vs. Art. Inst., 39 Fl. 484.....	324
Giles vs. Spaulding, 5 Hun, 458.....	320	Haynes vs. Second Bapt. Ch., 88 Mo. 285.....	259, 291, 337
Gillen vs. Hubbard, 2 Hilt. 303.....	330	Hayward vs. Leonard, 7 Pick. 180.....	257
Gilman vs. Hall, 11 Vt. 510.....	258	Heard vs. Wadham, 1 East. 619.....	279
Gilman vs. Stevens, 54 N. Y. Pr. Rep. 197.....	40, 114	Heckman vs. Pinkney, 81 N. Y. 211.....	241
Gilmore vs. Lewis, 12 Ohio, 281.....	17	Heden vs. Coleman, 73 N. Y. 567.....	178
		Heine vs. Meyer, 61 N. Y. 171.....	304
		Herrick vs. Belknap, 27 Vt. 673.....	171
		Herrington vs. Hubbard, 1 Scam. 569.....	299
		Hilliard vs. Richardson, 3 Gray, 349.....	338
		Hill vs. Hovey, 26 Vt. 109.....	300

Digitized by Google



xviii ARCHITECT, OWNER AND BUILDER BEFORE THE LAW.

Lynn vs. B. & O. R. R., 60 Md. 26.....	171	Miller vs. Phillips, 31 Penn. St. 218.....	247, 249, 316
Lyons vs. King, 11 Met. 411.....	216	Mills vs. Joiner, 21 Fla. 479.....	305
<hr/>			
Mactier vs. Frith, 6 Wend. 103.....	184	Mills vs. Weeks, 21 Ill. 561.....	91, 161, 175
Mahon vs. Daly, 70 Ill. 653.....	100	Milner vs. Field, 5 Exch. 829.....	169, 174
Mansfield vs. Lowell, 62 Mich. 546.....	193	Mineral Point R. R. vs. Keep, 22 Ill. 9.....	276
Mansfield vs. N. Y. C. R. R., 102 N. Y.		Minn. Oil Co. vs. Collins Lead Co., 4	
205.....	302, 325	Dill, 431.....	185
Marcotte vs. Beaupre, 15 Minn. 152.....	130	Mittnacht vs. Wolf, 6 Penn. St. 44.....	261
Marsh vs. Kauff, 74 Ill. 189.....	324	Moffatt vs. Dickson, 13 C. B. 543.....	172
Marsh vs. Masterson.....	97	Moll vs. Foery, 43 Hun, 476.....	242
Martin vs. Leggett, 4 E. D. Smith, 255.		Moody vs. Leverich, 4 Daly, 401.....	104
.....	171, 175	Moore vs. Bennett, 40 Cal. 251.....	100
Martine vs. Nelson, 51 Ill. 422.....	219	Moore vs. Fox, 10 Johns. 244.....	4, 216
Masters vs. Houck, 39 Mich. 431.....	243	Moore vs. Goodwin, 43 Hun, 534.....	140
Mayor vs. Ackers, 16 L. J. Ex. 6.....	172	Moore vs. Henry, 18 Mo. App. 35.....	193
Mayor vs. Butler, 1 Barb. 325.....	322	Moore vs. Platte Co., 8 Mo. 39.....	319
Mayor vs. Reynolds, 20 Md. 10.....	201	Morgan vs. Stevens, 6 Abb. Pr. 356.	
McAndrews vs. Tippet, 10 Vr. 109.....	172	(N. C.).....	265
McAvoy vs. Long, 13 Ill. 147.....	174	Morgan vs. Birnie, 9 Bing. 672.....	163, 175
McAuley vs. Carter, 22 Ill. 53.....	161	Morrison vs. Lovejoy, 6 Minn. 319.....	306
McCarren vs. McNulty, 7 Gray, 139.....		Moulton vs. McOwen, 103 Mass. 591.....	257
.....	139, 173, 315	Mulligan vs. Mulligan, 18 La. Ann. 30.....	123
McConey vs. Wallace, 22 Mo. App. 377.....	320	Mumby vs. Bowdon, 25 Fla. 454.....	339
McCormick vs. Wilson, 39 Minn. 507.....	208	Munroe vs. Butt, 8 El. & B. 738.....	174
McCulloch vs. Eagle Iron Co., 1 Pick.		Murphy vs. Buckman, 66 N. Y. 297.....	330
278.....	185	Mutual Benefit Ins. Co. vs. Rowand, 11	
McCulloch vs. Talladega Ins. Co., 46		C. E. Gr. 389.....	122, 261
Ala. 376.....	197	Myer vs. Hart, 40 Mich. 617.....	320
McCullough vs. Baker, 47 Mo. 401.....	298	Myers vs. Sarl, 30 L. J. Q. B. 9.....	146
McGowan vs. U. S., 21 Ct. of Cl. 476.....	263	<hr/>	
McIntire vs. Barnes, 4 Col. 285.....	265, 322	N. E. Iron Co. vs. Gilbert, 91 N. Y. 153.....	270
McLane vs. De Leyer, 56 N. Y. 619.....	265	Neenan vs. Donoghue, 60 Mo. 493.....	171
McLaughlin vs. Child, 62 Ind. 412.....	262	Nelson vs. Pickwick, 30 Ill. App. 333.....	324
McLees vs. Hale, 10 Wend. 426.....	216	Nelson vs. Spooner, 2 F. & F. 613.....	70
McLeod vs. Meade, 77 Cal. 87.....	17	Newcomb vs. De Roos, 2 E. & E. 271.....	184
McMahon vs. N. Y. & E. R. R., 20 N.		Newhall vs. Clark, 3 Cush. 376.....	274
Y. 463.....	173, 178	Newman vs. Fowler, 8 Vr. 89.....	55
McMaster vs. State, 108 N. Y. 542.....	292, 296	Nibble vs. Braun, 24 Ill. 268.....	322
McMillin vs. Vanderlip, 12 Johns. 665.....	234	Niblo vs. Binasse, 3 Abb. Pr. 375.....	303, 337
Mellen vs. Ford, 28 Fed. Rep. 639.....	268	Nolan vs. Whitney, 88 N. Y. 648.....	172, 242
Meehan vs. Williams, 36 Abb. Pr. 73.....	322	Norris vs. Day, 10 L. J. N. S. 43.....	94
Memory vs. Niepert, 131 Ill. 623.....	104	Northampton vs. Tuttle, 11 Vr. 476.....	185
Menne vs. Neumeister, 25 Mo. App.		Norton vs. Wiswall, 14 N. Y. P. R. 42.....	77
300.....	291	Nourry vs. Lord, 3 N. Y. 392.....	16
M. E. Parish vs. Clarke, 74 Me. 110.....	192, 273	Noyes vs. Phillips, 60 N. Y. 408.....	320
Mercer vs. Harris, 4 Neb. 82.....		<hr/>	
.....	160, 161, 166, 179	O'Connors vs. Hurley, 147 Mass. 145.....	308
Mercer vs. Jackson, 54 Ill. 397.....	339	O'Donnell vs. Clinton, 145 Mass. 461-3.....	280
Merrick vs. Burlington, 11 Iowa, 75.....	197	Ormes vs. Beadel, 2 Giff. 166.....	170, 174
Morrow vs. Huntoon, 25 Vt. 9.....	258	Owens vs. Hodges, 1 McMullen, 106.....	316
Meyers vs. Bennett, 7 Daly, 471.....	308		

## TABLE OF CASES CITED.

xix

Packard vs. Van Schaick, 58 Ill. 79....	172	Rice vs. Dwight, 2 Cush. 80.....	107
Paddock vs. Stout, 121 Ill. 571.....	322	Richards vs. Edick, 17 Barb. 280 .....	320
Paige vs. Barrett, 151 Mass. 67.....	103	Richardson vs. Mahon, 4 L. R. C. P.	
Paige vs. Ott, 5 Denio, 406.....	234	486.....	174
Paradine vs. Jayne, Alleyn, 26.....	333	Richardson vs. Shaw, 1 Mo. App. 234..	335
Park vs. Kitchen, 1 Mo. App. 357....	299	Richmond vs. Robinson, 12 Mich. 193..	320
Partridge vs. Forsyth, 29 Ala. 200....	332	Ricker vs. Cutter, 8 Gray, 248.....	260
Pat. Brick Co. vs. Moore, 75 Cal. 205..	319	Robbins vs. Blodgett, 121 Mass. 584...	316
Patrick vs. Putnam, 27 Vt. 756.....	127	Robbins vs. Blodgett, 124 Mass. 279..	275
Patten vs. Hicks, 43 Cal. 511.....	305	Roberts vs. Bury, 4 L. J. C. P. 755, 5 L.	
Patterson vs. Crowther, 70 Md. 124....	259	J. C. P. 310.....	135
Pattison vs. Luckley, 10 L. R. Ex. 330..	220	Roberts vs. Rockbottom Co., 7 Met. 46.	215
Pawley vs. Turnbull, 3 Giff. 70....	133, 174	Robinson vs. Jarvis, 25 Mo. App. 421..	193
Pearce vs. McGowan, 35 Minn. 507....	208	Robinson vs. Springfield Iron Co., 39	
People vs. Bank, 24 Wend. 431.....	201	Hun, 634.....	81
People vs. Croton Board, 9 Barb. 259..	221	Robinson vs. Snyder, 25 Penn. St. 203..	250
People vs. Dorsheimer, 55 Howard Pr.		Robson vs. Godfrey, Holt, 236.....	297
Rep. 118.....	226	Ross vs. Board of Education, 42 O. S.	
People vs. Hall, 48 Mich. 482.....	79, 80	374.....	226
People vs. Stevens, 71 N. Y. 527.....	227	Roumage vs. Ins. Co., 1 C. E. Gr. 110..	173
People's Co. Ass'n vs. Lloyd, 77 Ala. 387.	106	Roy vs. Boteler, 40 Mo. App. 213.....	159
Perkins vs. Jones, 26 Ind. 499.....	217	R. R. Co. vs. Lauffer, 84 Penn. St. 168..	122
Petersen vs. Rawson, 34 N. Y. 370....	33	Ruddock vs. Belton, 7 Bradw. 517..	103, 105
Philippus vs. McLean, 5 Mo. App. 587..		Rude vs. Mitchell, 97 Mo. 365....	281, 307
.....	203, 208	Ruff vs. Rinaldo, 55 N. Y. 604.....	322
Phillips vs. Rose, 8 Johns. 393.....	279	Rush vs. Able, 90 Penn. St. 153.....	122
Pierson vs. Morch, 82 N. Y. 503.....	17	Russell vs. Slade, 12 Conn. 445.....	216
Pike vs. Butler, 4 Const. 380.....	234	Ryan vs. Dayton, 25 Conn. 188.....	126
Pike vs. Nash, 1 Keyes, 335.....	287	Ryer vs. Stockwell, 14 Cal. 134.....	17, 21
Finches vs. Swedish Luth. Ch., 55			
Conn. 183.....	256		
Plimpton vs. Curtiss, 15 Wend. 386....	216	Salton vs. Ralph, 15 Abb. Pr. 273.....	320
Porter vs. Stewart, 2 Aiken, 417.....	279	Sanborn vs. Neal, 4 Minn. 124.....	202
Pothier on Obligations, P. 1, c. 2, art. 3.	273	Sanford vs. Emery, 34 Ill. 458.....	328
Poussard vs. Spiers, 1 Q. B. Div., 410..	174	Sanger vs. Chicago, 65 Ill. 511.....	100
Powell vs. Howard, 109 Mass. 192.....	258	Saratoga, etc. vs. Row, 24 Wend. 74....	219
Powers vs. Yonkers, 114 N. Y. 145....	327	Scammon vs. Chicago, 25 Ill. 424.....	339
Presb. Ch. vs. Hoopes, 66 Md. 598.....	256	Scammon vs. Davis, 72 Cal. 393.....	327
Price vs. Kirk, 90 Penn. St. 47.....	122	Schaefer vs. Gilder, 3 Colorado, 15....	287
Proctor vs. Hartigan, 143 Mass. 462....	275	Sch. Dist. vs. Dauchy, 25 Conn. 530....	
Pullman vs. Corning, 14 Barb. 174....	242	.....	257, 331
P. W. & B. R. R. vs. Howard, 13 How.		Sch. Dist. vs. Randall, 5 Neb. 408.....	167
307.....	310	Sch. Trust. vs. Bennett, 3 Dutch. 515..	
		.....	230, 332
		Schenke vs. Rowell, 7 Daly, 286.....	171
Raeder vs. Bensberg, 6 Mo. App. 445..	125	Schreiner vs. Miller, 67 Iowa, 91.....	54
Randall vs. Van Vechten, 19 Johns. 65.	206	Schwartz vs. Saunders, 46 Ill. 18.....	
Rawson vs. Clark, 70 Ill. 656.....	301, 332	.....	300, 332, 334
Rayner vs. Linthorne, 2 C. & P. 124....	193	S. C. in Error, 18 Wend. 187.....	234
Reed vs. Board, 4 N. Y. 24.....	315	Scott vs. Corp. of Liverpool, 60 Eng. C.	
Reedy vs. Smith, 42 Cal. 245.....	194	L. 334.....	140, 171
Reynolds vs. Jourdan, 6 Cal. 108.....	157	Scott vs. Maier, 56 Mich. 514.....	115
Reynolds vs. Nelson, 6 Wend. 20.....	328	Scrivener vs. Pask, 1 L. R. C. P. 715..	270

xx ARCHITECT, OWNER AND BUILDER BEFORE THE LAW.

Schickle vs. Chouteau, 84 Mo. 161.....	186	Stephen vs. Buffalo, 20 Barb. 332.....	194
Selby vs. Hutchinson, 4 Gilm. 319.....		Stephens, 1 N. P. 306.....	257
..... 298, 309, 328		Stevens vs. Armstrong, 6 N. Y. 435.....	339
Sexton vs. Cook Co., 114 Ill. 174.....	202	Stevens vs. Crane, 37 Mo. App. 487....	105
Sexton vs. Chicago, 107 Ill. 323.....	153	Stevenson vs. Watson, 4 L. R. C. P. D.	
Seymour vs. Long Dock Co., 5 C. E.		148.....	136, 270
Gr. 397.....	284	Stewart vs. Keteltas, 9 Bosw. 261.....	159
Sharpe vs. St. Paul's, 29 L. T. N. S. 9..	174	Stone vs. Rennock, 31 Mo. App. 644....	192
Sharp vs. Smith, 32 Ill. App. 336.....	204	Stover vs. Gordon, 3 M. & S. 308.....	175
Shaw vs. Andrews, 9 Cal. 73.....	94	Strauss vs. Murtief, 64 Ala. 299.....	99
Shaw vs. Finney, 13 Met. 453.....	193	Strauss vs. R. R. Co., 7 W. Va. 368....	229
Shaw vs. First Bapt. Ch. 44 Minn. 22..	276	Stryker vs. Cassidy, 76 N. Y. 50.....	122
Sheldon vs. Sheldon, 3 Wis. 699.....	93	Stuart vs. Cambridge, 125 Mass. 102...	
Sherman vs. Bates, 15 Neb. 19.....	277	..... 88, 148, 208	
Sherman vs. Mayor, 1 N. Y. 316.....	263	Stubbs vs. Holywell R'y, 36 L. J. Ex.	
Sherwin vs. Rut. & Bur. R. R., 24 Vt.		166.....	126
347.....	279	Sutherland vs. Morris, 45 Hun, 259....	
Shipman vs. State, 43 Wis. 381.....	37	..... 173, 283	
Shute vs. Hamilton, 3 Daly, 462.....	322	Swain vs. Seamans, 9 Wall. 254.....	250
Shute vs. Taylor, 5 Met. 61.....	319	Sweeney vs. Thomson, 9 Lea, 359.....	260
Siebert vs. Leonard, 17 Minn. 434.....	306	Symmes vs. Frazier, 3 Mass. 344.....	17
Sinclair vs. Tallmadge, 35 Barb. 602...			
..... 240, 320, 322			
Smith vs. Alker, 102 N. Y. 87.....	172, 179	Tantholt vs. Ness, 35 Minn. 370.....	327
Smith vs. Boston, 36 N. H. 458.....	173	Tatterson vs. Suffolk, 106 Mass. 56....	216
Smith vs. Brady, 17 N. Y. 173.....		Taylor vs. Sandiford, 7 Wheat. 13.....	319
..... 229, 232, 235, 287, 315		Taylor vs. Gilsdorf, 74 Ill. 359.....	122
Smith vs. Briggs, 3 Denio, 73.. 140, 159, 315		Taylor vs. Fox, 16 Mo. App. 527.....	208
Smith vs. Coe, 2 Hilt. 305.....	291	Taylor vs. Mayor, 83 N. Y. 625.....	306
Smith vs. Dickey, 74 Tex. 61.....	69	Taylor vs. Merchants' Ins. Co., 9 How.	
Smith vs. Flanders, 129 Mass. 322.....	151	390.....	185
Smith vs. Gugerty, 4 Barb. 614.....		Taylor vs. Renn, 79 Ill. 181.. 161, 171,	324
..... 144, 237, 322		Tetz vs. Butterfield, 54 Wis. 242.....	141
Smith vs. Hayward, 7 A. & E. 544.....	103	Tew vs. Newbold, 1 C. & E. 260.....	294
Smith vs. Lowell Cong. Ch., 8 Pick. 177.	257	Tharsis Copper Co. vs. McElroy, 3 L.	
Smith vs. Ridge Sch. Dist., 20 Conn.		R. App. 1040.....	145
530.....	257	The Palo Alto, etc., 2 Ware, 343.....	185
Snell vs. Brown, 71 Ill. 134.....	161, 171	Thomas vs. Caldwell, 50 Ill. 138.....	206
Somers vs. Thayer, 115 Mass. 163.....	274	Thomas vs. Fleury, 26 N. Y. 26.....	169
Sonch vs. Strawbridge, 2 C. B. 808, 815.	216	Thomas vs. Greenwood, 69 Mich. 215..	186
Southworth vs. Flanders, 33 La. 190....	202	Thomas vs. Hunt, N. Y. App. Sept.	
Sperry vs. Fanning, 80 Ill. 371.... 320, 326		1867.....	282
Stadhard vs. Lee, 113 Eng. C. L. 369....	172	Thompson vs. Riggs, 5 D. C. 99.....	193
Stange vs. Wilson, 17 Mich. 342.....	323	Thompson vs. Wood, 1 Hilt. 93.....	104
Starkey vs. De Graff, 22 Minn. 431....	171	Thorn vs. London, 45 L. J. Ex. 487....	342
Starkey vs. Minneapolis, 19 Minn. 203..	221	Thornton vs. Place, 1 Mood & Rob. 218.	257
Starkweather vs. Goodman, 48 Conn.		Thorpe vs. White, 13 Johns. 53.....	234
101.....	88, 143	Tilley vs. Cook Co., 13 Otto, 155.....	23
State vs. Betts, 4 C. C. 86 (Ohio).....	226	Tinker vs. Geraghty, 1 E. D. Smith,	
State vs. Board of Education, 20 Bull,		687.....	293
156.....	227	Tobey vs. Price, 75 Ill. 645.....	324
State ex rel. vs. Hoshaw, 98 Mo. 358..	212	Tompkins vs. Dudley, 25 N. Y. 272....	
State vs. Hayes, 52 Mo. 578.....	201	..... 303, 332	
Steas vs. Leonard, 20 Minn. 494... 209, 210			

## TABLE OF CASES CITED.

xxi

Topping <i>vs.</i> Swords, 1 E. D. Smith, 109..	221	Webb <i>vs.</i> School, 3 Phila. 125.....	111
Trevor <i>vs.</i> Wood, 36 N. Y. 307.....	185	Webb <i>vs.</i> Trescony, 76 Cal. 621.....	110
Truckee Lodge <i>vs.</i> Wood, 14 Nevada, 293.....	281	Webster <i>vs.</i> Enfield, 5 Gilm. 300.....	298
Trustees <i>vs.</i> Bradfield, 30 Georgia, 1..	313	Weed, etc., <i>vs.</i> Barch, 56 N. Y. 1 <sup>st</sup> Rep. 470.....	227
Trustees <i>vs.</i> Lynch, 5 Gilm. 521.....	174	Week <i>vs.</i> McCarthy, 89 N. Y. 566.....	324
Trustees <i>vs.</i> Platt, 5 Bradw. 567.....	138, 148, 282, 290	Weeks <i>vs.</i> Little, 47 N. Y. Sup. Ct. 1..	160
Trustees <i>vs.</i> Schaffer, 63 Ill. 243..	100	Wehrli <i>vs.</i> Rehboldt, 107 Ill. 60.....	108
Tucker <i>vs.</i> Grover, 60 Wis. 240.....	305	Wells <i>vs.</i> Board of Edu., 78 Mich. 260..	328
Turney <i>vs.</i> Bridgeport, 65 Conn. 412..	197	Wells <i>vs.</i> Calnan, 107 Mass. 514.....	173
Tuttle <i>vs.</i> Mayo, 7 Johns. 132.....	297	Wells <i>vs.</i> Horton, 4 Bing. 40-43.....	216
		Wentworth <i>vs.</i> Day, 3 Met. 352.....	17
		West <i>vs.</i> Platt, 127 Mass. 367-72.....	280
		Westwood <i>vs.</i> Sec'y of State, 11 W. R. 261.....	163
U. P. R. R. <i>vs.</i> Graddy, 25 Neb. 854....	193	Wheeden <i>vs.</i> Fiske, 50 N. H. 125.....	297
U. S. <i>vs.</i> Robeson, 9 Pet. 319.....	173	Whitaker <i>vs.</i> Sandifer, 1 Duvall, (Ky.), 261.....	104
		White <i>vs.</i> Harrigan, 41 Minn. 414..	93, 328
Vadney <i>vs.</i> Person, 27 Hun, 226.....	274	White <i>vs.</i> McLaren, 151 Mass. 553.....	271
Van Buskirk <i>vs.</i> Murden, 22 Ill. 446....	312	White <i>vs.</i> Quincy, 97 Mass. 430.....	258
Van Buskirk <i>vs.</i> Stow, 42 Barb. 9.....	294	White <i>vs.</i> S. R. R., 50 Cal. 417.....	283
Vandewerker <i>vs.</i> Central R. R., 27 Vt. 130.....	173	Whiteside <i>vs.</i> U. S., 83 U. S. 257.....	201
Van Hovenbergh <i>vs.</i> Lindsay, 1 Alb. L. J. 122.....	264	Whitfield <i>vs.</i> Levy, 6 Vr. 149.....	319
Vassar <i>vs.</i> Camp, 1 Kernan, 441.....	184	Whitfield <i>vs.</i> Zellnor, 2 Cushman, (Miss.) 663.....	304
Veazi <i>vs.</i> Hosmer, 11 Gray, 396.....	258	Wilbey <i>vs.</i> Paw-Paw, 25 Mich. 419. 141, 316	
Vermont St. Ch. <i>vs.</i> Brose, 104 Ill. 206.	141, 160, 178, 266	Wilkins <i>vs.</i> Wardens, 52 Georgia, 315..	202
Verzan <i>vs.</i> McGregor, 23 Cal. 339.....	219	William <i>vs.</i> Chicago Coal Co., 60 Ill. 149.....	99
Vigeant <i>vs.</i> Scully, 20 Bradw. 437.....	29	Williams <i>vs.</i> Cowardine, 4 B. & Ald. 621.....	18
Ville de St. Germain <i>vs.</i> Malpiece et Moutier, Dalloz, 1845, 1-8.....	58	Williams <i>vs.</i> Fitzmaurice, 3 H. & N. 844.....	154, 270
Voorhees <i>vs.</i> Combs, 4 Vr. 494.....	108	Williams <i>vs.</i> Porter, 51 Mo. 441.....	298
		Wilson <i>vs.</i> Bauman, 80 Ill. 403.....	298
		Wilson <i>vs.</i> White, 71 Georgia, 506.....	277
Wade <i>vs.</i> Haydock, 25 Penn. St. 382....	342	Wilson <i>vs.</i> York R. R., 11 G. & J. 58..	71
Wadsworth <i>vs.</i> Smith, 6 L. R. Q. B. 332.	174	Wolfe <i>vs.</i> Howes, 20 N. Y. 197.....	127
Walker <i>vs.</i> Fitchburg, 102 Mass. 407..	317	Wood <i>vs.</i> Perry, 1 Barb. 114.....	286
Walker <i>vs.</i> Orange, 16 Gray, 193.....	258	Woodward <i>vs.</i> Fuller, 80 N. Y. 312. 172, 241	
Wallace <i>vs.</i> Holmes, 36 Ill. 156.....	175	Worsley <i>vs.</i> Wood, 6 T. R. 710.....	175
Walling <i>vs.</i> Warren, 2 Colorado, 434..	229	Wright <i>vs.</i> Dannel, 2 Camp. 203.....	193
Wallis <i>vs.</i> Carpenter, 13 Allen, 19.....	319	Wyckoff <i>vs.</i> Meyers, 24 N. Y. 143..	159, 161
Wallis <i>vs.</i> Bailey, 49 N. Y. 464.....	260		
Walsh <i>vs.</i> St. Louis Exp., 16 Mo. App. 502; 90 Mo. 459.....	18	Yeats <i>vs.</i> Ballentine, 50 Mo. 530.....	
Walsh <i>vs.</i> Walsh, 11 Bradw. 199.....	172	..... 178, 258, 307, 316	
Walworth <i>vs.</i> Finnegan, 33 Ark. 751..	250	Young <i>vs.</i> Preston, 4 Cranch, 239.....	309
Wangler <i>vs.</i> Swift, 90 N. Y. 38-43.....	173		
Watson <i>vs.</i> Ambergate, 15 Jurist, 448..	26		
Watts <i>vs.</i> Shepard, 2 Ala. 425.....	318	Zaliski <i>vs.</i> Clark, 44 Conn. 218.....	139

## CASES CITED BY STATES.

### UNITED STATES.

<i>Bank of Columbia vs. Patterson</i> , 7 Cranch, 305.....	197, 206
<i>Bank of Metropolis vs. Gutschlick</i> , 14 Pet. 19.....	206
<i>Batchelor vs. Kirkbride</i> , 27 Fed. Rep. 899.....	170
<i>Belt vs. Cook's etc.</i> , 3 Cranch, 666.....	285
<i>Chicago vs. Tilley</i> , 13 Otto, 146.....	119
<i>Culbertson vs. Ellis</i> , 6 McLean, 248.....	310
<i>Dermott vs. Jones</i> , 2 Wall. 9.....	287, 332
<i>Dist. Columbia vs. Gallaher</i> , 124 U. S. 505.....	152
<i>Fleckner vs. Bank of U. S.</i> , 8 Wheat. 338.....	197
<i>Ford vs. U. S.</i> , 17 Ct. of Cl. 60.....	281
<i>Gibbons vs. U. S.</i> , 15 Ct. of Cl. 174; 109 U. S. 200.....	338
<i>McGowan vs. U. S.</i> , 21 Ct. of Cl. 476.....	263
<i>Mellen vs. Ford</i> , 28 Fed. Rep. 639.....	268
<i>Minn. Oil Co. vs. Collins Lead Co.</i> , 4 Dill, 431.....	185
<i>P. W. &amp; B. R. R. vs. Howard</i> , 13 How. 307.....	310
<i>Swain vs. Seamans</i> , 9 Wall. 254.....	250
<i>Tayloe vs. Sandiford</i> , 7 Wheat. 13.....	319
<i>Taylor vs. Merchants' Ins. Co.</i> , 9 How. 390.....	185
<i>The Palo Alto, etc.</i> , 2 Ware, 343.....	185
<i>Tilley vs. Cook Co.</i> , 13 Otto, 155.....	23
<i>U. S. vs. Robeson</i> , 9 Pet. 319.....	173
<i>Westwood vs. Sec'y of State</i> , 11 W. R. 261.....	163
<i>Whiteside vs. U. S.</i> , 83 U. S. 257.....	201
<i>Young vs. Preston</i> , 4 Cranch, 239.....	309

### ALABAMA.

<i>Badders vs. Denio</i> , 88 Ala. 367.....	316
<i>Brumby vs. Smith</i> , 3 Ala. (N. S.) 123..	332
<i>Carlisle vs. Campbell</i> , 76 Ala. 247.....	193
<i>Dryer vs. Lewis</i> , 57 Ala. 550.....	126
<i>Fowler vs. Armour</i> , 24 Ala. 199.....	104
<i>Holloway vs. Talbot</i> , 70 Ala. 389.....	103
<i>Hooper vs. S. &amp; M. R. R.</i> , 69 Ala. 536..	318
<i>McCulloch vs. Talladega Ins. Co.</i> , 46 Ala. 376.....	197
<i>Partridge vs. Forsyth</i> , 29 Ala. 200.....	332
<i>People's Co. Ass'n vs. Lloyd</i> , 77 Ala. 387.	106
<i>Strauss vs. Murtief</i> , 64 Ala. 299.....	99
<i>Watts vs. Shepard</i> , 2 Ala. 425.....	318

### ARKANSAS.

<i>Walworth vs. Finnegan</i> , 33 Ark. 751...	250
---	-----

### CALIFORNIA.

<i>Baldwin vs. Bennett</i> , 4 Cal. 392.....	100
<i>Blethen vs. Blake</i> , 44 Cal. 117.....	178
<i>Blythe vs. Poultney</i> , 31 Cal. 233.....	329
<i>Boswell vs. Laird</i> , 8 Cal. 469.....	74
<i>Castagnino vs. Balletta</i> , 21 Cal. 1097...	308
<i>Cox vs. McLaughlin</i> , 54 Cal. 605.....	300
<i>Dingley vs. Greene</i> , 54 Cal. 333.....	173
<i>Hunt vs. Elliott</i> , 77 Cal. 588.....	259
<i>McLeod vs. Meade</i> , 77 Cal. 87.....	17
<i>Moore vs. Bennett</i> , 40 Cal. 251.....	100
<i>Pat. Brick Co. vs. Moore</i> , 75 Cal. 205..	319
<i>Patten vs. Hicks</i> , 43 Cal. 511.....	305
<i>Reedy vs. Smith</i> , 42 Cal. 245.....	194
<i>Reynolds vs. Jourdan</i> , 6 Cal. 108.....	157
<i>Ryer vs. Stockwell</i> , 14 Cal. 134.....	17, 21

CASES CITED BY STATES.

xxiii

Scammon vs. Davis, 72 Cal. 393.....	327
Shaw vs. Andrews, 9 Cal. 73.....	94
Verzan vs. McGregor, 23 Cal. 339.....	219
Webb vs. Treascony, 76 Cal. 621.....	110
White vs. S. R. R. R., 50 Cal. 417.....	283

COLORADO.

McIntire vs. Barnes, 4 Col. 285....	265, 322
Schaefer vs. Gilder, 3 Colorado, 15....	287
Walling vs. Warren, 2 Colorado, 434..	229

CONNECTICUT.

Blakeslee vs. Holt, 22 Conn. 226.....	257
Cannon vs. Wildman, 28 Conn. 372....	261
Clark vs. Pendleton, 20 Conn. 495.....	216
Lambert vs. Sanford, 55 Conn. 437....	112
Pinches vs. Swedish Luth. Ch., 55 Conn. 183.....	256
Russell vs. Slade, 12 Conn. 445.....	216
Ryan vs. Dayton, 25 Conn. 188.....	126
Sch. Dist. vs. Dauchy, 25 Conn. 530....	257, 331
Smith vs. Ridge Sch. Dist., 20 Conn. 530.....	257
Starkweather vs. Goodman, 48 Conn. 101.....	88, 143
Turney vs. Bridgeport, 55 Conn. 412....	197
Zaliski vs. Clark, 44 Conn. 218.....	139

DELAWARE.

Crumlech vs. Wilmington R. R. 5 Del. Ch. 270.....	179
---	-----

DISTRICT OF COLUMBIA.

Hammond vs. Miller, 2 Mackey, 145....	330
Thompson vs. Riggs, 5 D. C. 99.....	193

FLORIDA.

Haydenville vs. Art Inst., 39 Fl. 484....	324
Mills vs. Joiner, 21 Fla. 479.....	305
Mumby vs. Bowdon, 25 Fla. 454.....	339

GEORGIA.

Green vs. Jackson, 66 Georgia, 250....	276
Leonard vs. House, 15 Georgia, 473....	173
Trustees vs. Bradfield, 30 Georgia, 1....	313
Wilkins vs. Wardens, 52 Georgia, 315....	202
Wilson vs. White, 71 Georgia, 506.....	277

ILLINOIS.

Ada St. M. E. Church vs. Garnsey, 66 Ill. 132.....	72
--	----

Austin vs. Wohler, 5 Bradw. 300.....	323
Badger vs. Kerber, 61 Ill. 328.....	162
Barney vs. Giles, 120 Ill. 154.....	159, 171
Bonnet vs. Glatfeldt, 120 Ill. 166.....	300
Bouton vs. Supervisors, 84 Ill. 384....	91
Brigham vs. Hawley, 17 Ill. 38.....	230
Butts vs. Huntley, 1 Scam. 410....	231, 299
Campbell vs. Day, 90 Ill. 363.....	92
Carpenter vs. I. N. Bank, 119 Ill. 352..	193
Cent. Mil. Co. vs. Spruck, 24 Ill. 587...	175
Chicago vs. Sexton, 115 Ill. 230.....	230
Chicago vs. Shober, 6 Bradw. 560.....	201
Chiles vs. Belleville, 68 Ill. 123.....	99
Ch. of Com. vs. Sollitt, 43 Ill. 519.....	326
Clark vs. Pope, 70 Ill. 128.....	138, 175, 178, 288, 342
Coeys vs. Lehmann, 79 Ill. 173.....	171, 195, 208, 316
Cook Co. vs. Harms, 108 Ill. 151.....	170, 308, 312
Cook vs. Murphy, 70 Ill. 96.....	280
Crabtree vs. Hagersleigh, 25 Ill. 233...	100
Dana vs. Short, 81 Ill. 468.....	103
Dement vs. Rokker, 26 Ill. 174.....	202
Dobbins vs. Higgins, 78 Ill. 440.....	230
Donlin vs. Daegling, 80 Ill. 608.....	211
Downey vs. O'Donnell, 86 Ill. 49.....	161
Downey vs. O'Donnell, 92 Ill. 559.....	173
Dull vs. Bramhall, 43 Ill. 364.....	110
Dunton vs. Chamberlain, 1 Bradw. 361..	16
Ely vs. Ely, 80 Ill. 240.....	173
Estep vs. Fenton, 66 Ill. 467.....	313
Evans vs. Ch. & R. I. R. R., 26 Ill. 189.	230, 299
Ewing vs. Directors, 2 Bradw. 468.....	99
Ewing vs. Fiedler, 30 Bradw. 202.....	175
Eyster vs. Parrott, 83 Ill. 517.....	322
Finney vs. Condon, 86 Ill. 78.....	161
Folliott vs. Hunt, 21 Ill. 654.....	231, 299
Fowler vs. Deakman, 84 Ill. 180....	172, 323
Fox vs. Turner, 1 Bradw. 153.....	184, 186
Fuller vs. Little, 61 Ill. 1.....	99
Graveson vs. Tobey, 75 Ill. 540.....	323
Hamilton vs. Scully, 118 Ill. 192.....	323
Hamlin vs. Race, 78 Ill. 422.....	100
Herrington vs. Hubbard, 1 Scam. 569..	299
Hindman vs. Borders, 89 Ill. 336.....	77
Holmes vs. Stummel, 24 Ill. 370....	230, 299
Johnston vs. Ewing, 35 Ill. 518.....	262
Kerfoot vs. Cromwell Mound Co., 115 Ill. 502.....	6, 192
Korf vs. Lull, 70 Ill. 420.....	161, 163, 178, 313, 315
Lane vs. Sharp, 3 Scam. 566-7.....	208

**Adams vs. Cosby**, 48 Ind. 153..... 295, 307  
**Archer vs. Commissioners**, 3 Ind. 501.. 203

**MARYLAND.**

**B. & O. R. R. *vs.* Resley, 7 Md. 297.... 171**  
**Dugan *vs.* Anderson, 36 Md. 567..... 101**

Eichelberger vs. Miller, 20 Md. 334.....	336	McCarren vs. McNulty, 7 Gray, 139...	
Ellicott vs. Peterson, 4 Md. 476.....	216	..... 139, 173, 315	
Hampson vs. Lewis, 49 Md. 178.....	329	McCulloch vs. Eagle Iron Co., 1 Pick.	
Jaffray vs. King, 34 Md. 217.....	99, 100	278.....	185
Lynn vs. B. & O. R. R., 60 Md. 26.....	171	Moulton vs. McOwen, 103 Mass. 591...	257
Mayor vs. Reynolds, 20 Md. 10.....	201	Newhall vs. Clark, 3 Cush. 376.....	274
Patterson vs. Crowther, 70 Md. 124.....	259	O'Connors vs. Hurley, 147 Mass. 145..	308
Presb. Ch. vs. Hoopes, 66 Md. 598.....	256	O'Donnell vs. Clinton, 145 Mass. 461-3.	280
Wilson vs. York R. R., 11 G. & J. 58...	71	Paige vs. Barrett, 151 Mass. 67.....	103

## MASSACHUSETTS.

Abbey vs. Chase, 6 Cush. 56.....	205	Ricker vs. Cutter, 8 Gray, 248.....	200
Adams vs. Boston Iron Co., 10 Gray, 495.	310	Robbins vs. Blodgett, 121 Mass. 584...	316
Adams vs. Nichols, 19 Pick. 275.....	332	Robbins vs. Blodgett, 124 Mass. 270..	275
Atkins vs. Barnstable, 97 Mass. 428...	174	Roberts vs. Rockbottom Co., 7 Met. 46.	215
Bartlett vs. Stanchfield, 148 Mass. 394..	280	Shaw vs. Finney, 13 Met. 453.....	193
Blair vs. La Hire, 127 Mass. 518.....	100	Shute vs. Taylor, 5 Met. 61.....	319
Blake vs. Cole, 22 Pick. 97.....	216	Smith vs. Flanders, 120 Mass. 322.....	151
Blood vs. Wilson, 141 Mass. 25.....	258	Smith vs. Lowell Cong. Ch., 8 Pick. 177.	257
Brackett vs. Lubke, 4 Allen, 138.....	338	Somers vs. Thayer, 115 Mass. 163.....	274
Brown vs. Foster, 113 Mass. 136.....	140	Stuart vs. Cambridge, 125 Mass. 102...	
Burke vs. Dunbar, 128 Mass. 499.....	340	..... 88, 148, 208	
Chapman vs. Lowell, 4 Cush. 378.....	78	Symmes vs. Frazier, 3 Mass. 344.....	17
Cleary vs. Sohler, 120 Mass. 310.....	322	Tatterson vs. Suffolk, 106 Mass. 56...	216
Commonwealth vs. Squire, 1 Met. 258..	262	Veazie vs. Hosmer, 11 Gray, 306.....	258
Connors vs. Hennessy, 112 Mass. 96...	338	Walker vs. Fitchburg, 102 Mass. 407..	317
Damon vs. Granby, 2 Pick. 345.....	205	Walker vs. Orange, 16 Gray, 193.....	258
Daniels vs. Newton, 114 Mass. 530-8...	99	Wallis vs. Carpenter, 13 Allen, 19....	319
Dwight vs. Ludlow, 128 Mass. 280.....	186	Wells vs. Calnan, 107 Mass. 514.....	173
Farquhar vs. Brown, 132 Mass. 340.....	274	Wentworth vs. Day, 3 Met. 352.....	17
Fisk vs. Gray, 11 Allen, 132.....	319	West vs. Platt, 127 Mass. 367-72.....	280
Folsom vs. McDonough, 6 Cush. 208...	321	White vs. McLaren, 151 Mass. 553.....	271
Forsyth vs. Hooper, 11 Allen, 419.....	338	White vs. Quincy, 97 Mass. 430.....	258
Fox vs. Harding, 7 Cush. 516.....	273		
Fullam vs. West Brookfield, 9 Allen, 1.	205		
Goddard vs. Barnard, 16 Gray, 205....	273		
Gorham vs. Gross, 125 Mass. 232.....	339		
Gray vs. James, 128 Mass. 110.....	274		
Hastings vs. Aiken, 1 Gray, 163.....	262		
Hayward vs. Leonard, 7 Pick. 180.....	257		
Hilliard vs. Richardson, 8 Gray, 349...	338		
Huntington vs. Knox, 7 Cush. 374.....	205		
Jewitt vs. Brooks, 134 Mass. 505.....	80		
Keith vs. Lothrop, 10 Cush. 453.....	80		
Kent vs. Kent, 18 Pick. 569.....	216		
Keys vs. Stone, 5 Mass. 391.....	297		
Lewis vs. Browning, 130 Mass. 173....	185		
Linnehan vs. Matthews, 149 Mass. 29...	274		
Linton vs. Smith, 8 Gray, 147.....	338		
Lord vs. Wheeler, 1 Gray, 282.....	338		
Loring vs. Boston, 7 Met. 409.....	17		
Lowell vs. Allen, 14 Allen, 130.....	323		
Lyons vs. King, 11 Met. 411.....	216		

## MICHIGAN.

Allen vs. McKibbin, 5 Mich. 449..	127, 244
Barlow vs. Gray, 57 Mich. 623.....	197
Boyle vs. Desenberg, 74 Mich. 79.....	227
Chapman vs. Deane, 34 Mich. 875.....	300
Daniels vs. Mosher, 2 Mich. 183.....	79
Davis vs. Freeman, 10 Mich. 188.....	320
Eggleston vs. Wagner, 46 Mich. 610...	183
Ferguson vs. Davis, 66 Mich. 678.....	275
Fildew vs. Besley, 42 Mich. 100.....	337
First C. Church vs. Walrath, 27 Mich.	
232.....	320
Gibson vs. Cranage, 39 Mich. 49.....	140
Hanley vs. Walker, 79 Mich. 607.....	
..... 174, 178, 307	
Hitchcock vs. Bengett, 38 Mich. 501..	80
Jaquith vs. Hudson, 5 Mich. 123.....	320
Kearney vs. Doyle, 22 Mich. 294.....	298



<b>Mansfield vs. Lowell</b> , 62 Mich. 546.....	193	<b>Damhorst vs. Mo. Pac. R. R.</b> , 32 Mo. App. 350.....	77
<b>Masters vs. Houck</b> , 39 Mich. 431.....	243	<b>Dinsmore vs. Livingston</b> , 60 Mo. 241.....	307
<b>Myer vs. Hart</b> , 40 Mich. 517.....	320	.....	174,
<b>People vs. Hall</b> , 48 Mich. 482.....	79, 80	<b>Druiding vs. Lyon</b> , 7 Mo. App. 199.....	25
<b>Richmond vs. Robinson</b> , 12 Mich. 193..	320	<b>Ehrlich vs. Aetna</b> , 15 Mo. App. 562;	298
<b>Scott vs. Maier</b> , 56 Mich. 514.....	115	88 Mo. 249.....	258
<b>Stange vs. Wilson</b> , 17 Mich. 342.....	323	<b>Eyerman vs. Mt. Sinai</b> , 61 Mo. 489....	258
<b>Thomas vs. Greenwood</b> , 69 Mich. 215..	186	<b>Falls Mfg. Co. vs. Broderick</b> , 12 Mo. App. 378.....	186
<b>Wells vs. Board of Edu.</b> , 78 Mich. 260..	328	<b>Fitzgerald vs. Beers</b> , 31 Mo. App. 356..	276
<b>Wildey vs. Paw-Paw</b> , 25 Mich. 419. 141,	316	<b>Fitzgerald vs. Hayward</b> , 50 Mo. 516....	299
<b>MINNESOTA.</b>			
<b>Bast vs. Leonard</b> , 15 Minn. 304.....	277	<b>Fitzsimmons vs. Christian Brothers</b> , 81 Mo. 37.....	259
<b>Bixby vs. Williamson</b> , 25 Minn. 481....	242	<b>Fleischmann vs. Miller</b> , 38 Mo. App. 177.....	305
<b>Bolles vs. Sachs</b> , 37 Minn. 315.....	105	<b>Gauss vs. Hussmann</b> , 21 Mo. App. 343..	308
<b>Elliott vs. Caldwell</b> , 43 Minn. 357.....	248	<b>Given vs. Waggoner</b> , 38 Mo. 297.....	193
<b>Hooper vs. Webb</b> , 27 Minn. 485.....	304	<b>Gregg vs. Dunn</b> , 38 Mo. App. 283..	297, 305
<b>Knight vs. Norris</b> , 13 Minn. 473... 114,	123	<b>Haynes vs. Second Bapt. Ch.</b> , 88 Mo. 285.....	259, 291, 337
<b>Langdon vs. Northfield</b> , 42 Minn. 464..	174, 323	<b>Ibers vs. O'Donnell</b> , 25 Mo. App. 120..	297
<b>Marcotte vs. Beaupre</b> , 15 Minn. 152....	130	<b>Ittner vs. St. Louis Exp.</b> , 97 Mo. 562... 263	
<b>McCormick vs. Wilson</b> , 39 Minn. 507..	208	<b>Keating vs. Kansas</b> , 84 Mo. 415.....	202
<b>Morrison vs. Lovejoy</b> , 6 Minn. 319....	306	<b>Kelly vs. Rowane</b> , 33 Mo. App. 440....	299
<b>Pearce vs. McGowan</b> , 35 Minn. 507....	208	<b>Lancaster vs. Conn.</b> , 92 Mo. 460... 262, 343	
<b>Sanborn vs. Neal</b> , 4 Minn. 126.....	202	<b>Legg vs. Dunleavy</b> , 80 Mo. 558.....	95
<b>Shaw vs. First Bapt. Ch.</b> , 44 Minn. 22..	276	<b>Lottman vs. Barnett</b> , 62 Mo. 159.....	74
<b>Siebert vs. Leonard</b> , 17 Minn. 434.....	306	<b>McConey vs. Wallace</b> , 22 Mo. App. 377..	320
<b>Starkey vs. De Graff</b> , 22 Minn. 431....	171	<b>McCullough vs. Baker</b> , 47 Mo. 401....	298
<b>Starkey vs. Minneapolis</b> , 19 Minn. 203..	221	<b>Menne vs. Neumeister</b> , 25 Mo. App. 300.....	291
<b>Stees vs. Leonard</b> , 20 Minn. 494... 209, 210		<b>Moore vs. Henry</b> , 13 Mo. App. 35.....	193
<b>Tantholt vs. Ness</b> , 35 Minn. 370.....	327	<b>Moore vs. Platte Co.</b> , 8 Mo. 39.....	319
<b>White vs. Harrigan</b> , 41 Minn. 414.. 93,	328	<b>Neenan vs. Donoghue</b> , 50 Mo. 493....	171
<b>MISSISSIPPI.</b>			
<b>Armfield vs. Nash</b> , 31 Miss. 361.....	104	<b>Park vs. Kitchen</b> , 1 Mo. App. 357.....	299
<b>Baum vs. Covert</b> , 62 Miss. 113.....	308	<b>Philipps vs. McLean</b> , 5 Mo. App. 587..	293, 298
<b>Benton Co. vs. Patrick</b> , 54 Miss. 240... 83		<b>Raeder vs. Bensberg</b> , 6 Mo. App. 445..	125
<b>Collins vs. Money</b> , 4 Miss. 11.....	265	<b>Richardson vs. Shaw</b> , 1 Mo. App. 234..	335
<b>Whitfield vs. Zellnor</b> , 2 Cushman, (Miss.) 663.....	304	<b>Robinson vs. Jarvis</b> , 25 Mo. App. 421..	193
<b>MISSOURI.</b>			
<b>Ahern vs. Boyce</b> , 19 Mo. App. 552.. 83,	298	<b>Roy vs. Boteler</b> , 40 Mo. App. 213....	159
<b>Allen vs. Bowman</b> , 7 Mo. App. 29.....	25	<b>Rude vs. Mitchell</b> , 97 Mo. 365.... 281, 307	
<b>Atlee vs. Fisk</b> , 75 Mo. 100.....	96	<b>Schickle vs. Chouteau</b> , 84 Mo. 161....	186
<b>Austin vs. Keating</b> , 21 Mo. App. 30....	298	<b>State ex rel. vs. Hoshaw</b> , 98 Mo. 358..	212
<b>Basye vs. Ambrose</b> , 28 Mo. 39.....	319	<b>State vs. Hayes</b> , 52 Mo. 578.....	201
<b>Booge vs. Pac. R. R.</b> , 33 Mo. 212.....	104	<b>Stevens vs. Crane</b> , 37 Mo. App. 487....	105
<b>Brecheisen vs. Coffey</b> , 15 Mo. App. 80..	186	<b>Stone vs. Rennock</b> , 31 Mo. App. 544....	192
<b>Brown vs. Strimple</b> , 21 Mo. App. 338..	212	<b>Taylor vs. Fox</b> , 16 Mo. App. 527.....	208
<b>Brown vs. Wabash</b> , 18 Mo. App. 568..	193	<b>Walsh vs. St Louis Exp.</b> , 16 Mo. App. 502; 90 Mo. 459.....	18
<b>Burch vs. New Lindell</b> , 7 Mo. App. 583..	194	<b>Williams vs. Porter</b> , 51 Mo. 441.....	298
<b>Burke vs. Kansas City</b> , 34 Mo. App. 570.....	87	<b>Yeats vs. Ballentine</b> , 56 Mo. 530.....	178, 258, 307, 316

**MONTANA.**

<i>Isaacs vs. McAndrews</i> , 1 Mont. 437....	107
<i>Lescher vs. Commissioners</i> , 9 Mont. 315.	202

**NEBRASKA.**

<i>Mercer vs. Harris</i> , 4 Neb. 82.....	160, 161, 166, 179
<i>Sch. Dist. vs. Randall</i> , 5 Neb. 408.....	167
<i>Sherman vs. Bates</i> , 15 Neb. 19.....	277
<i>U. P. R. R. vs. Graddy</i> , 25 Neb. 864....	193

**NEVADA.**

<i>Hoole vs. Kinhead</i> , 16 Nev. 217.....	225
<i>Keller vs. Blasdel</i> , 1 Nev. 492.....	195
<i>Lapham vs. Osborne</i> , 20 Nev. 168.....	305
<i>Truckee Lodge vs. Wood</i> , 14 Nevada, 203.....	281

**NEW HAMPSHIRE.**

<i>Blanding vs. Sargent</i> , 33 N. H. 239....	216
<i>Eaty vs. Aldrich</i> , 46 N. H. 128.....	216
<i>Smith vs. Boston</i> , 36 N. H. 468.....	173
<i>Wheeden vs. Fiske</i> , 50 N. H. 125.....	297

**NEW JERSEY.**

<i>Bond vs. Newark</i> , 4 C. E. Gr. 376..	89, 165
<i>Bozarth vs. Dudley</i> , 15 Vr. 304.....	250, 291, 297, 316
<i>Chiddick vs. Marsh</i> , 1 Zab. 434.....	319
<i>Chism vs. Schipper</i> , 22 Vr. 1.....	168
<i>Condon vs. Jersey City</i> , 14 Vr. 452.	147, 282
<i>Furman vs. Parke</i> , 1 Zab. 310.....	17
<i>Gilman vs. Hall</i> , 11 Vt. 510.....	258
<i>Guerin vs. Rodwell</i> , 8 Vr. 71.....	146
<i>Halleck vs. Com. Ins. Co.</i> , 2 Dutch. 268; 3 Dutch. 645.....	185
<i>Haslack vs. Meyers</i> , 2 Dutch. 284....	230
<i>Haughwout vs. Boisaubin</i> , 3 C. E. Gr. 315.....	184
<i>Jacobus vs. Mutual Benefit Ins. Co.</i> , 12 C. E. Gr. 604.....	262
<i>Lansing vs. Dodd</i> , 16 Vr. 525.....	320
<i>McAndrews vs. Tippet</i> , 10 Vr. 109....	172
<i>Mutual Benefit Ins. Co. vs. Rowand</i> , 11 C. E. Gr. 889.....	122, 261
<i>Newman vs. Fowler</i> , 8 Vr. 89.....	55
<i>Northampton vs. Tuttle</i> , 11 Vr. 476....	185
<i>Roumage vs. Ins. Co.</i> , 1 C. E. Gr. 110..	173
<i>Sch. Trust. vs. Bennett</i> , 3 Dutch. 515..	230, 332
<i>Seymour vs. Long Dock Co.</i> , 5 C. E. Gr. 397.....	284

<i>Voorhees vs. Combs</i> , 4 Vr. 494.....	108
<i>Whitfield vs. Levy</i> , 6 Vr. 149.....	319

**NEW YORK.**

<i>Adams vs. Mayor</i> , 4 Duer. 295.....	159
<i>Alger vs. Vanderpoel</i> , 34 J. & S. 161...	294
<i>Allamon vs. Mayor</i> , 43 Barb. 33.....	301
<i>Anderson vs. Meislahn</i> , 12 Daly, 149...	172, 264
<i>Andrews vs. Durant</i> , 11 N. Y. 35.....	332
<i>Andrews vs. Montgomery</i> , 19 Johns. 205.	309
<i>Bagley vs. Peddie</i> , 5 Sandf. 192.....	319
<i>Barber vs. Rose</i> , 5 Hill, 78.....	322
<i>Barton vs. Hermann</i> , 11 Abb. Pr. 379. (N. S.).....	163, 173, 179
<i>Bassford vs. Oelrichs</i> , 40 Hun, 637....	141
<i>Bigler vs. Mayor</i> , 9 Hun, 253.....	312
<i>Bimbauer vs. Gleason</i> , 48 Hun, 614....	294
<i>Bloodgood vs. Ingoldsby</i> , 1 Hilt. 388. .....	159, 179
<i>Bonesteel vs. Mayor</i> , 22 N. Y. 162.....	88
<i>Bowery Nat. Bank vs. Mayor</i> , 63 N. Y. 336.....	169
<i>Brady vs. Mayor</i> , 18 N. Y. Pr. Rep. 343..	200
<i>Bristol vs. Tracy</i> , 21 Barb. 236.....	287
<i>Britton vs. Phillips</i> , 24 N. Y. Sup. Ct. 111.....	185
<i>Brockway vs. Allen</i> , 17 Wend. 40.....	206
<i>Bronson vs. Gleason</i> , 7 Barb. 472.....	195
<i>Brown vs. Webster</i> , 38 N. Y. 187.....	229
<i>Butler vs. Tucker</i> , 24 Wend. 441.....	173
<i>Callmeyer vs. Mayor</i> , 83 N. Y. 116....	267
<i>Cassidy vs. Lefevre</i> , 45 N. Y. 562.....	299
<i>Champlin vs. Rowley</i> , 13 Wend. 258....	234
<i>Clark vs. Gilbert</i> , 26 N. Y. 279.....	127
<i>Clark vs. Marsiglia</i> , 1 Denio, 317.....	104
<i>Clark vs. Mayor</i> , 4 N. Y. 338.....	297, 298
<i>Colburn vs. Woodworth</i> , 31 Barb. 381..	103
<i>Colwell vs. Lawrence</i> , 36 N. Y. 306....	320
<i>Crane vs. Knubel</i> , 43 N. Y. Pr. Rep. 389.	316
<i>DeKay vs. Bliss</i> , 42 Hun, 650.....	261
<i>Delacroix vs. Bulkley</i> , 13 Wend. 71....	280
<i>DeLafield vs. State</i> , 26 Wend. 238.....	201
<i>Devlin vs. Mayor</i> , 63 N. Y. 8.....	300
<i>Dewitt vs. Barley</i> , 9 N. Y. 371.....	79
<i>Dickinson vs. Po'keepsie</i> , 75 N. Y. 65, 77.	263
<i>Doyle vs. Halpin</i> , 33 J. & S. 352.....	172
<i>Drummond vs. Burrell</i> , 15 Wend. 307..	4
<i>Dubois vs. Canal Co.</i> , 4 Wend. 290....	299
<i>Duffield vs. Johnston</i> , 96 N. Y. 369....	275
<i>Eccles vs. Darragh</i> , 48 N. Y. Sup. Ct. 506.....	277
<i>Ericsson vs. Brown</i> , 38 Barb. 391.....	125

Esmonde vs. Van Benschoten, 12 Barb. 386.....	322	McMillin vs. Vanderlip, 12 Johns. 665..	234
Everson vs. Power, 89 N. Y. 527.....	90	Meehan vs. Williams, 36 Abb. Pr. 73..	322
Fahy vs. North, 19 Barb. 341.....	127	Meyers vs. Bennett, 7 Daly, 471.....	308
Fallon vs. Lawler, 102 N. Y. 228.....	309	Moll vs. Foery, 43 Hun, 476.....	242
Farnham vs. Ross, 2 Hall, 167....	304, 321	Moody vs. Leverich, 4 Daly, 401.....	104
Fireproof Bldg. Co. vs. First N. Bk., 54 N. Y. Sup. Ct. 511.....	276	Moore vs. Fox, 10 Johns. 244.....	4, 216
Flood vs. Mitchell, 68 N. Y. 507.....	316	Moore vs. Goodwin, 43 Hun, 534.....	140
Gallagher vs. Nichols, 60 N. Y. 438....	306	Morgan vs. Stevens, 6 Abb. Pr. 356. (N. C.).....	265
Giles vs. Snauling, 5 Hun, 458.....	320	Murphy vs. Buckman, 66 N. Y. 207....	330
Gillen vs. Hubbard, 2 Hilt. 303.....	330	N. E. Iron Co. vs. Gilbert, 91 N. Y. 153..	270
Gilman vs. Stevens, 54 N. Y. Pr. Rep. 197.....	40, 114	Niblo vs. Binsse, 3 Abb. Pr. 375....	303, 337
Glacius vs. Black, 50 N. Y. 145.....	140, 165, 312, 315	Nolan vs. Whitney, 88 N. Y. 648..	172, 242
Green vs. Haines, 1 Hilt. 254.....	295	Norton vs. Wiswall, 14 N. Y. P. R. 42..	77
Griffin vs. Culver, 16 N. Y. 489.....	299	Nourry vs. Lord, 3 N. Y. 392.....	16
Haight vs. Sahler, 30 Barb. 218.....	206	Noyes vs. Phillips, 60 N. Y. 408.....	320
Hall vs. Bennett, 48 N. Y. Sup. Ct. 302.	307	Paige vs. Ott, 5 Denio, 406.....	234
Harmony vs. Bingham, 12 N. Y. 99.....	333	People vs. Bank, 24 Wend. 431.....	201
Harris vs. Panama R. R., 32 N. Y. 427.	79	People vs. Croton Board, 9 Barb. 259..	221
Hart vs. Ryan, 6 N. Y. Supp. 921.....	341	People vs. Dorsheimer, 55 Howard Pr. Rep. 118.....	226
Heckman vs. Pinkney, 81 N. Y. 211....	241	People vs. Stevens, 71 N. Y. 527.....	227
Heden vs. Coleman, 73 N. Y. 567.....	178	Petersen vs. Rawson, 34 N. Y. 370....	33
Heine vs. Meyer, 61 N. Y. 171.....	304	Phillips vs. Rose, 8 Johns. 393.....	279
Hoffman vs. Gallaher, 6 Daly, 42.....	140	Pierson vs. Morch, 82 N. Y. 503.....	17
Hough vs. Brown, 19 N. Y. 111.....	187	Pike vs. Nash, 1 Keyes, 335.....	287
Howard vs. Daly, 61 N. Y. 362.....	103	Plimpton vs. Curtiss, 15 Wend. 336..	216
Howell vs. Gould, 2 Abb. Pr. 418.....	303	Powers vs. Yonkers, 114 N. Y. 145....	327
Hubert vs. Aitken, 15 Daly, 237....	46, 122	Pullman vs. Corning, 14 Barb. 174....	242
Hunt vs. Utica, 18 N. Y. 442.....	17	Randall vs. Van Vechten, 19 Johns. 65.	206
Jennings vs. Camp, 13 Johns. 94.....	234	Reed vs. Board, 4 N. Y. 24.....	315
Johnson vs. De Peyster, 50 N. Y. 666..	241	Reynolds vs. Nelson, 6 Wend. 20.....	328
Jones vs. Judd, 4 N. Y. 411.....	297, 304	Richards vs. Edick, 17 Barb. 260.....	320
Judd vs. Ensign, 6 Barb. 258.....	194	Robinson vs. Springfield Iron Co., 39 Hun, 634.....	81
Kingsley vs. Brooklyn, 78 N. Y. 200..	289	Ruff vs. Rinaldo, 55 N. Y. 664.....	322
Kirtland vs. Moore, 1 Cent. Rep. 466..	172	Salton vs. Ralph, 15 Abb. Pr. 273....	320
Leminsdate vs. Limpton, 10 Johns. 36..	297	Saratoga, etc. vs. Row, 24 Wend. 74..	219
Lloyd vs. Brewster, 4 Paige, 537.....	219	Schenke vs. Rowell, 7 Daly, 286.....	171
Lockwood vs. Barnes, 3 Hill, 128.....	216	S. C. in Error, 18 Wend. 187.....	234
Loeffler vs. Froehlich, 35 Hun, 368....	164	Sherman vs. Mayor, 1 N. Y. 316.....	263
Lord vs. Thomas, 64 N. Y. 107.....	204	Shute vs. Hamilton, 3 Daly, 462.....	322
Mactier vs. Frith, 6 Wend. 103.....	184	Sinclair vs. Tallmadge, 35 Barb. 602..	240, 320, 322
Mansfield vs. N. Y. C. R. R., 102 N. Y. 205.....	302, 325	Smith vs. Aiker, 102 N. Y. 87.....	172, 179
Martin vs. Leggett, 4 E. D. Smith, 255.	171, 175	Smith vs. Brady, 17 N. Y. 173.....	229, 232, 235, 287, 315
Mayor vs. Butler, 1 Barb. 325.....	322	Smith vs. Briggs, 3 Denio, 73..	140, 159, 315
McLane vs. De Leyer, 56 N. Y. 619....	265	Smith vs. Coe, 2 Hilt. 365.....	291
McLees vs. Hale, 10 Wend. 426.....	216	Smith vs. Gugerty, 4 Barb. 614.....	144, 237, 322
McMahon vs. N. Y. & E. R. R., 20 N. Y. 463.....	173, 178	Stephen vs. Buffalo, 20 Barb. 332....	194
McMaster vs. State, 108 N. Y. 542..	292, 296	Stevens vs. Armstrong, 6 N. Y. 435....	339
		Stewart vs. Keteltas, 9 Bosw. 261.....	159

Stryker vs. Cassidy, 76 N. Y. 50.....	122
Sutherland vs. Morris, 45 Hun, 259..	173, 283
Taylor vs. Mayor, 83 N. Y. 625.....	306
Thomas vs. Fleury, 26 N. Y. 26.....	169
Thomas vs. Hunt, N. Y. App. Sept. 1867.....	282
Thompson vs. Wood, 1 Hilt. 93.....	104
Thorpe vs. White, 13 Johns. 53.....	234
Tinker vs. Geraghty, 1 E. D. Smith, 687.....	293
Tompkins vs. Dudley, 25 N. Y. 272....	303, 332
Topping vs. Swords, 1 E. D. Smith, 109..	221
Trevor vs. Wood, 36 N. Y. 307.....	185
Tuttle vs. Mayo, 7 Johns. 132.....	297
Vadney vs. Person, 27 Hun, 226.....	274
Van Buskirk vs. Stow, 42 Barb. 9.....	294
Van Hovenbergh vs. Lindsay, 1 Alb. L. J. 122.....	264
Vassar vs. Camp, 1 Kernan, 441.....	184
Walls vs. Bailey, 49 N. Y. 464.....	260
Wangler vs. Swift, 90 N. Y. 38-43.....	173
Weed, etc., vs. Barch, 56 N. Y. Pr. Rep. 470.....	227
Week vs. McCarthy, 89 N. Y. 566.....	324
Weeks vs. Little, 47 N. Y. Sup. Ct. 1..	160
Wolfe vs. Howes, 20 N. Y. 197.....	127
Wood vs. Perry, 1 Barb. 114.....	286
Woodward vs. Fuller, 80 N. Y. 312. 172, 241	
Wyckoff vs. Meyers, 24 N. Y. 143.. 159, 161	

#### NORTH CAROLINA.

Blount vs. Guthrie, 99 N. C. 93.....	182
Lawing vs. Rintles, 97 N. C. 350.....	337

#### OHIO.

Gilmore vs. Lewis, 12 Ohio, 281.....	17
Hughes vs. Clyde, 41 O. S. 339....	186, 188
Kane vs. Stone Co., 39 O. S. 1.....	173
Lumber Co. vs. Purdum, 41 O. S. 373. ....	230, 332
Ross vs. Board of Education, 42 O. S. 374.....	226
State vs. Betts, 4 C. C. 86 (Ohio).....	226

#### PENNSYLVANIA.

Adams Express Co. vs. Egbert, 36 Penn. St. 360.....	26
Bank vs. Gries, 35 Penn. 423.....	121
Bryant vs. Stilwell, 24 Penn. St. 314..	286
Campbell vs. Gates, 10 Penn. St. 483..	299
Commissioners vs. Mitchell, 82 Penn. 343.....	222, 223, 224

Curry vs. Larer, 7 Penn. St. 470.....	319
Gore vs. Island City, 24 Pa. 521.....	306
Hartuppee vs. City, 97 Penn. St. 107. 164, 316	
Homan vs. Stanley, 66 Penn. St. 464....	277
Jordan vs. Meredith, 3 Yeates, 318....	260
Miller vs. Phillips, 81 Penn. St. 218....	247, 249, 316
Mittnacht vs. Wolf, 6 Penn. St. 44....	261
Price vs. Kirk, 90 Penn. St. 47.....	122
Robinson vs. Snyder, 25 Penn. St. 203..	250
R. R. Co. vs. Laufer, 84 Penn. St. 168..	122
Rush vs. Able, 90 Penn. St. 153.....	122
Wade vs. Haydock, 25 Penn. St. 382....	342
Webb vs. School, 3 Phila. 125.....	111

#### RHODE ISLAND.

Bradstreet vs. Baker, 14 R. I. 546.....	319
---	-----

#### SOUTH CAROLINA.

Owens vs. Hodges, 1 McMullen, 106....	319
Pike vs. Butler, 4 Const. 300.....	234

#### TENNESSEE.

Galyon vs. Ketchon, 85 Tenn. 55.....	337
Sweeney vs. Thomason, 9 Lea, 359.....	260

#### TEXAS.

Boettler vs. Tendick, 73 Tex. 488.....	161
Hollis vs. Chapman, 36 Tex. 11.....	332
Smith vs. Dickey, 74 Tex. 61.....	69

#### VERMONT.

Boody vs. R. & B. R. R., 24 Vt. 660....	308
Clifford vs. Richardson, 18 Vt. 620....	327
Dyer vs. Jones, 8 Vt. 206.....	258
Herrick vs. Belknap, 27 Vt. 673.....	171
Hill vs. Hovey, 26 Vt. 109.....	300
Joslyn vs. Merrow, 25 Vt. 185.....	258
Kettle vs. Harvey, 21 Vt. 301; 24 Vt. 515; 33 Vt. 39.....	229
Merrow vs. Huntoon, 25 Vt. 9.....	258
Patrick vs. Putnam, 27 Vt. 756.....	127
Porter vs. Stewart, 2 Aiken, 417.....	279
Sherwin vs. Rut. & Bur. R. R., 24 Vt. 347.....	279
Vandewerker vs. Central R. R., 27 Vt. 130.....	173

#### VIRGINIA.

B. & O. R. R. vs. Polly, 14 Gratt. 447..	171
Byrne vs. Sisters, 16 Va. 213.....	172
Iaeg vs. Bossieux, 15 Gratt. 83.....	165

# xxx ARCHITECT, OWNER AND BUILDER BEFORE THE LAW.

James River Co. <i>vs.</i> Adams, 17 Gratt.	427.....	291
Strauss <i>vs.</i> R. R. Co., 7 W. Va.	368.....	229

## WISCONSIN.

Baasen <i>vs.</i> Baehle, 7 Wis.	516.....	173
Bannister <i>vs.</i> Patty, 35 Wis.	316..	172, 178
Bentley <i>vs.</i> Davidson, 74 Wis.	420....	172
Bentley <i>vs.</i> State, 73 Wis.	416.....	342
Cohen <i>vs.</i> Stein, 61 Wis.	508.....	305
Cook <i>vs.</i> McCabe, 53 Wis.	250.....	332
Dodge <i>vs.</i> McDonnell, 14 Wis.	553....	85
Eaton <i>vs.</i> School Dist., 23 Wis.	374....	332
Fetz <i>vs.</i> Butterfield, 54 Wis.	242.....	171
Fitzpatrick <i>vs.</i> Cottingham, 14 Wis.	219....	319
Gordon <i>vs.</i> Brewster, 7 Wis.	355.....	103
Hudson <i>vs.</i> McCartney, 33 Wis.	331....	171
Jackson <i>vs.</i> Cleveland, 19 Wis.	400....	329
Sheldon <i>vs.</i> Sheldon, 3 Wis.	699.....	93
Shipman <i>vs.</i> State, 43 Wis.	381.....	37
Tetz <i>vs.</i> Butterfield, 54 Wis.	242.....	141
Tucker <i>vs.</i> Grover, 60 Wis.	240.....	305

## CANADA.

Ellis <i>vs.</i> Abell, 10 A. R.	226. (Ontario).	21
Irving <i>vs.</i> Morrison, 27 C. P. (Upper Canada),	242.....	76, 114, 158

## ENGLAND.

Adams <i>vs.</i> Lindsell, 1 B. & Ald.	681....	184
Archard <i>vs.</i> Horner, 3 Car. & Payne,	349.....	104
Baron de W. <i>vs.</i> Mellier, 16 L. R. Eq.	554.....	175
Batterbury <i>vs.</i> Vyse, 32 L. J. Ex.	177..	170
Bliss <i>vs.</i> Smith, 34 Beav.	508.....	134
Bragdon <i>vs.</i> Metrop. R. R., 2 App.	Cas. 691.....	184
Byrne <i>vs.</i> Van Tienhoven, 50 P. D.	344-8.....	184
Clark <i>vs.</i> Watson, 114 Eng. C. L.	278..	140, 170, 174
Cooper <i>vs.</i> Langdon, 9 M. & W.	60..	88, 144
Cutler <i>vs.</i> Powell, 2 Sm. L. C.	48.....	104
Dobson <i>vs.</i> Hudson, 1 C. B. N. S.	652..	174
Dunlap <i>vs.</i> Higgins, 1 H. L. Cas.	387-400.....	184
Elderton <i>vs.</i> Emmens, 6 C. B.	160, 187.	99
Ellis <i>vs.</i> Hamlen, 3 Taunt.	52.....	234, 270
England <i>vs.</i> Davidson, 11 A. & E.	866..	18
Farebrother <i>vs.</i> Simmons, 5 B. & Ald.	333.....	193
Fewing <i>vs.</i> Tiedall, 1 Exch. R.	295....	104

Gandell <i>vs.</i> Pontigny, 4 Camp.	375....	104
Goodman <i>vs.</i> Pocock, 15 Q. B.	576....	104
Gray <i>vs.</i> Pullen, 5 B. & S.	970.....	277
Hadley <i>vs.</i> Baxendale, 9 Exch.	341....	273
Harris Case, 7 L. R. Ch.	587.....	184
Hartley <i>vs.</i> Harman, 11 A. & E.	798..	103
Heard <i>vs.</i> Wadham, 1 East.	619.....	279
Hochster <i>vs.</i> De La Tour, 20 Eng. L. & E. Rep.	157....	102
Holtzapffel <i>vs.</i> Baker, 18 Ves.	115....	333
Household Ins. Co. <i>vs.</i> Grant, 4 Ex. D.	216.....	184
Hull <i>vs.</i> Heightman, 2 East.	145.....	114
Kemp <i>vs.</i> Rose, 1 Giff. S. C.	258..	132, 269
Kimberly <i>vs.</i> Dick, 13 L. R. Eq. L.	131, 174	
Lancaster <i>vs.</i> Walsh, 4 M. & W.	16....	18
Littler <i>vs.</i> Holland, 3 T. R.	590.....	279
Mayor <i>vs.</i> Ackers, 16 L. J. Ex.	6.....	172
Milner <i>vs.</i> Field, 5 Exch.	829....	169, 174
Moffatt <i>vs.</i> Dickson, 13 C. B.	543....	172
Morgan <i>vs.</i> Birnie, 9 Bing.	672....	163, 175
Munroe <i>vs.</i> Butt, 8 El. & B.	738....	174
Myers <i>vs.</i> Sarl, 30 L. J. Q. B.	9.....	146
Nelson <i>vs.</i> Spooner, 2 F. & F.	613....	70
Newcomb <i>vs.</i> De Roos, 2 E. & E.	271..	184
Norris <i>vs.</i> Day, 10 L. J. N. S.	43.....	94
Ormes <i>vs.</i> Beadel, 2 Giff.	168....	170, 174
Paradine <i>vs.</i> Jayne, Alleyne,	26.....	333
Pattison <i>vs.</i> Luckley, 10 L. R. Ex.	330..	220
Pawley <i>vs.</i> Turnbull, 3 Giff.	70....	133, 174
Poussard <i>vs.</i> Spiers, 1 Q. B. Div.	410..	174
Rayner <i>vs.</i> Linthorne, 2 C. & P.	124....	193
Richardson <i>vs.</i> Mahon, 4 L. R. C. P.	486..	174
Roberts <i>vs.</i> Bury, 4 L. J. C. P.	755, 5 L. J. C. P.	310.....
Robson <i>vs.</i> Godfrey, Holt,	236.....	297
Scott <i>vs.</i> Corp. of Liverpool, 60 Eng. C. L.	334.....	140, 171
Scrivener <i>vs.</i> Pask, 1 L. R. C. P.	715....	270
Sharpe <i>vs.</i> St. Paul's, 29 L. T. N. S.	9..	174
Smith <i>vs.</i> Hayward, 7 A. & E.	544....	103
Sonch <i>vs.</i> Strawbridge, 2 C. B.	808, 815.	213
Stadhard <i>vs.</i> Lee, 113 Eng. C. L.	369..	172
Stephens, 1 N. P.	306.....	257
Stevenson <i>vs.</i> Watson, 4 L. R. C. P. D.	148.....	136, 270
Stover <i>vs.</i> Gordon, 3 M. & S.	308.....	175
Stubbs <i>vs.</i> Holywell R'y, 36 L. J. Ex.	163.....	126
Tew <i>vs.</i> Newbold, 1 C. & E.	260.....	294
Tharsis Copper Co. <i>vs.</i> McElroy, 3 L. R. App.	1040.....	145
Thorn <i>vs.</i> London, 45 L. J. Ex.	487....	342
Thornton <i>vs.</i> Place, 1 Mood & Rob.	218..	257

CASES CITED BY STATES.

xxxi

Wadsworth <i>vs.</i> Smith, 6 L. R. Q. B. 332. 174	Cassation, 15 juin, 1863.....	60
Watson <i>vs.</i> Ambergate, 15 Jurist, 448.. 26	Commune de Colombier-Saugniere <i>vs.</i>	
Wells <i>vs.</i> Horton, 4 Bing. 40-43..... 216	Duchez et Savoye, Dalloz, 1883,	
Williams <i>vs.</i> Cowardine, 4 B. & Ald. 621. 18	3-92.....	83
Williams <i>vs.</i> Fitzmaurice, 3 H. & N.	Costansin <i>vs.</i> Duperche, Dalloz, 1874,	
844..... 154, 270	1-285.....	61
Worsley <i>vs.</i> Wood, 6 T. R. 710..... 175	Dalloz, 1849, 2-171.....	129
Wright <i>vs.</i> Dannel, 2 Camp. 203..... 193	Dalloz, 1871, 2-83.....	129
<b>FRANCE.</b>		
Bourdais et Davioud <i>vs.</i> Cannes, Dal-	Fleury-Boisson <i>vs.</i> Juguet et Senetaire,	
loz, 1886, 3-4..... 71	Dalloz, 1884, 2-132.....	62
	Ville de St. Germain <i>vs.</i> Malpiece et	
	Moutier, Dalloz, 1845, 1-8.....	58



# ARCHITECT, OWNER AND BUILDER BEFORE THE LAW.

---

## CHAPTER I.

### THE ARCHITECT AND THE OWNER.

**T**HERE is an old proverb, that "he who undertakes to be his own lawyer has a fool for his client"; and if one who essays to be his own architect usually purchases at a very high price a very imperfect knowledge of some portion of the art of building, the man who imagines that by reading a few law-books he will be enabled to get the better of his less instructed fellow-citizens is likely to have his illusion removed still more suddenly and unceremoniously.

Nevertheless, as by knowing something of the art of construction persons of intelligence are led to greater respect for those who devote their lives to the study and practice of that art, and, by understanding their counsels better, derive greater benefit from their services, so may a layman, by knowing something of the legal rights and responsibilities which belong to his position, be enabled to avoid the misunderstandings which lie at the bottom of nearly all business disputes, at the same time that he is forewarned against the errors by which he will incur the penalties of neglect of duty, and fortified, if necessary, in his endeavors to resist intentional fraud, or to enforce just claims. Among all the business relations which men enter into, there are none, perhaps, more complex than those which are involved in the construction of a building, by the coöperation of a multitude of contractors, journeymen, and dealers in materials, under the supervision of an architect, for the owner of the land on which the building is erected, who is also the employer

**Why the  
Architect  
should know  
something of  
Law.**



## 2      *ARCHITECT, OWNER AND BUILDER BEFORE THE LAW.*

of the architect ; and it speaks more for the general honesty and good faith with which such operations are carried on than for the prudence of the persons who engage in them that there are hardly any two classes of men whose legal status, in regard to other people, is so undefined as that of architects and builders.

Of these, the architects seem to have had the least occasion to appeal to the law in defence of their rights. Perhaps a million building contracts, taking the world over, are carried into execution every year, and it would be strange if, out of all these, disputes enough should not arise to make the list of building cases decided in the courts a tolerably long one ; but architects are not only less extensively employed than builders, but appear to be even more peacefully inclined, and cases to which architects are parties are rare. For this reason, much that relates to the legal position of architects must, for want of judicial decisions bearing precisely on the point, be inferred, or at least illustrated, by the comparison of cases belonging to the history of somewhat similar professions, yet, scanty as is the material for fixing his exact relations to other persons, the architect is so important a factor in building contracts carried out under his care that it is best to begin by defining those relations as carefully as circumstances will allow, taking up first the mutual duties and obligations of the architect and his client, the owner of the future building, and afterwards those which exist, or may, under certain conditions arise, between the architect and the builder.

### **The Arch- itect's Em- ployment.**

An architect may be employed in two different ways to render professional services. He may be hired, at a given salary, payable by the day, or week, or month, or year, to perform certain duties, or he may be simply engaged to do a certain piece of work, either for a fixed sum, expressed or implied, or, as is more usual, for a small percentage on the cost of the construction carried out under his charge. His engagement to render service in either of these ways forms the subject of a contract between him and his employer, and as it is upon this

contract that he must rely for obtaining his compensation, he cannot be too careful to have the terms of the agreement clearly understood by both parties. In consideration of the liability of the human memory to error, and to prevent innocent persons from being imposed upon by people professing to have claims against them, founded on long-forgotten conversations, the laws of all civilized countries provide that no court shall recognize, or assist in enforcing, any agreement for services which are not to be performed within one year from the time of the making of the agreement, unless the agreement, or some memorandum of it, shall be in writing, signed by "the party to be charged," that is, by the one from whom payment is sought. This rule is strictly applied in the case of hiring salaried employes, and when a man is, let us say, appointed city architect, or engaged as assistant engineer, "for one year from the first of next month," or "for twelve months from the beginning of the next financial year," he may be dismissed, without fault on his part, at any time before the expiration of that period, and will be without redress, unless he can show a contract, or a memorandum of his appointment, or some other unmistakable evidence of the terms of the understanding between him and his employer, expressed in writing, and signed, in some manner satisfactory to the court, either by the employer or by an authorized representative. There are many instances of the application of this rule, which is one of the sections of the Statute of Frauds, and appears, in nearly the same words, in the statute-books of all our States, as well as in those of other countries; but one or two illustrations will be enough. In a certain case a land-owner, on the twentieth of July, hired a steward, agreeing verbally to employ him for a year, but allowing him a few days to make arrangements for his change of place. The steward entered upon his duties on the twenty-fourth of July, and afterwards found occasion to call upon his master to perform his part of the agreement, but failed, the court holding that the contract of hiring was void under the Statute of Frauds, for want of writing. So where a

**Engagement  
for services  
which cannot  
be completed  
within a year  
must be in  
writing.**

Drummond  
vs.  
Burrell,  
15 Wend., 307.

Moore vs. Fox,  
10 Johns. R.,  
344.

journeyman wagon-builder verbally agreed to work two years for a certain firm, for which he was to receive one hundred dollars, or fifty dollars a year, and, after working for them six months, became tired of his bargain, and left them, it was held, when his employers sued him for breach of contract, that the agreement, not being in writing, was void under the Statute of Frauds. It is worth noticing, however, that it seems to have been the condition that the agreement was to be for two years, for one hundred dollars for the term, which brought it unmistakably within the statute, and if the contract had been, let us say, for services for two years at a dollar a week, there appears to be some doubt whether it might not have been enforced, although not attested by any written paper. In the discussion of the same case before the Supreme Court of the State of New York, reference was made to another, in which the defendant had verbally promised to pay the plaintiff, a minister, a salary of two dollars a year for his services. The services were duly rendered, and the defendant, probably thinking that the minister could not bear the loss of interest on his salary so well as himself, paid him a dollar every six months, instead of waiting until the end of the year before paying him his two dollars. This went on for several years, until differences arose between the minister and the capitalist, and the former had to bring suit to have the contract fulfilled by the other party. His claim was resisted on the ground that the agreement, being for services not to be performed within a year, was void under the Statute of Frauds. The court, however, decided that in the absence of any written contract or memorandum, the fact that the minister had got his dollar every six months was evidence, the value of which might be estimated by a jury, going to show that the real intention of the parties was to have the minister do six months' work at a time, and get his pay for it as soon as he had earned it, and if the jury concluded that this was the actual intention, the Statute of Frauds was inapplicable to the contract and it might be enforced. Fortunately for the minister the jury did come to this conclusion, and he recovered the

amount of his claim. It has been decided in Connecticut, also, where an engagement was made with a man to work in a factory a year, at a dollar a day, and the agreement was afterwards repudiated, that as there was no time agreed upon for the man to begin his work, he might have begun it immediately, and as the Statute of Frauds only refers to contracts which in their nature cannot be carried out within a year, it did not apply here.

Although the courts do not assent to any evasion of the law, they will accept a written and signed memorandum, made subsequently to the verbal agreement, and intended to refer to it, as a good substitute for it, and this written memorandum may be made at any time before the contract is completed. A good example of this is to be found in a case where a verbal contract was made for the sale of some coal, which was afterwards repudiated by the seller, and a suit for damages was contested on the ground that the contract was void by the Statute of Frauds. It was proved that some time after the verbal agreement of sale was made, the purchaser wrote to the agent of the defendants, asking for "a statement of our coal engagement," and received an answer, recounting the quantities and prices that had been agreed upon. This reply was signed by the agent, and the court held that it was a sufficient memorandum, and that the signature was sufficient to make the contract binding.

What may  
be taken as a  
signature.

Where there is no attempt at fraud or extortion, the courts are disposed to interpret the Statute of Frauds as favorably as possible for the party who would suffer by its strict enforcement. Even in the matter of the signature which the statute requires, a very liberal interpretation is allowed. In one case, where a contract had been written in the common form, reciting that "I, A. B." agree to some matter, but had not been signed in the usual place, on the line left blank for the purpose at the bottom of the page, the enforcement of the contract was resisted on the ground that it was not signed, and was therefore void; but the court, finding that the agreement was filled out in the defendant's handwriting, held that his insertion of his

own name, although not in the usual place for a signature, was a sufficient signing to satisfy the statute, and that he could not escape from his agreement.

Kerfoot  
vs.  
Oromwell  
Mound Co.,  
115 Ill., 502.

A still more striking instance of the disposition of courts to prevent people from using the technicalities of the law to evade their obligations is to be found in an Illinois case, where an agreement was made by the abutters on certain streets for having the roadway covered with gravel. A written contract was drawn up, under which all the abutters, who were described in it by name, were mentioned as parties, and two of them were appointed as a committee to sign it on behalf of all. One of the abutters, who may be called A. X., was authorized by a neighbor, whom we will call B. X., and who was one of the committee appointed to sign the contract, to sign the document for him, and did so under the form "B. X. by A. X.," but did not sign it on his own account. A. X. subsequently refused to pay his part of the cost of the gravel, saying that he did not sign the contract, and was not bound by it, but the Supreme Court held that his signature as agent for another person indicated that he had read the contract, and if he had done so he must have seen that he was himself mentioned in it, and that it was intended to bind him as well as the other abutters, and having under these circumstances signed it as agent for another person, without at the time protesting against his own name being included as a party to the agreement, he must be presumed to have assented to it, and his signature for B. X. ought to be regarded as sufficient evidence that he, as well as the person for whom he signed, intended to be bound by it. In cases where there is a doubt whether the contract is really to be performed within a year, and consequently, whether it must be written and signed, or not, the courts, where there is no indication that any false or improper claim is made, generally hold that although the employment to which the contract relates may not have been actually carried through within a year, still if it could have been so carried through, the agreement relating to it does not fall within the Statute of Frauds, and may

be recognized and enforced at law, although not in writing. This view of the subject has a particular interest for architects, who often make verbal contracts for planning and supervising building operations which extend over a much longer time than a year, and, although it would be unwise to encourage them in this hazardous practice, it may not be amiss to say that the conceptions of courts as to the amount of building that might be done within twelve months, if necessary to save a man from undeserved hardship, are based on the most liberal estimates of the rapidity with which it is possible for mechanics to work.

It must be observed, however, that the sanguine fancy of the jury in this regard will not be allowed to be brought into play if the contract or specification, or any other evidence relating to the engagement between the architect and his employer, shows that it was not intended or expected, at the time when the engagement was made, that his task would be completed within a year. If, for instance, as not unfrequently happens, an architect is employed to render the usual professional services in connection with a building to be erected or altered "when the leases expire," or when anything else happens which as both parties know, cannot occur within a year, he should be careful to have his engagement in writing, signed by his client, or he will find his contract, if it should be put to the test, void. If he has done any work for his client, such, for instance, as the preparation of the plans, before receiving notice that the other party abandoned the agreement, it seems to be the rule that he can recover a proper price, to be determined by the jury, for such services as he has already rendered, but the absence of a written contract in such cases debars him from claiming, as he might otherwise do, his full fee, as well as damages, in case his client should think fit to discard him before the work was begun, or while it was in progress, and appoint some one else in his stead.

In the case of works carried out under the ordinary circumstances, it might be thought that a clause in the contract with the builder, drawn up by the architect, and specifying a date for the

completion of the building more than twelve months from the time of the engagement of the architect who was commissioned to design and supervise the work, would bring the contract between the architect and the owner within the Statute of Frauds, and make it void if not in writing: but the architect is, under such circumstances, protected to some extent by the consideration that it might not have been known, when he agreed with his client, that so long a time would have to be allowed for the building operations; and even if this resource should fail him, it has been held that the assignment, in a verbal contract for building, of a date of completion more than a year from the time when the contract was made, did not bring the contract within the Statute of Frauds, for the reason that the agreement in fixing the date "at or before" which the building should be finished, did not forbid the builder to complete it many months before the contract time, if he wished to do so, and thus fulfil his agreement within the year, while the statute related only to contracts which obviously could not be completed within that time.

Unless the agreement between the architect and his employer relates to work which is not to be performed within twelve months from the time of making the agreement, or unless the former's services are rendered or promised in consideration of marriage, which is naturally not a common experience among architects, or unless the architect is to receive a piece of land or other real estate as compensation for his services, it is not necessary that the agreement should be in writing. On the contrary, it may be verbal, or implied, or partly written, and partly verbal, or implied, and will be just as binding as if written, and signed by the parties, and can, if there is no difference of opinion between the parties as to what the agreement was, be as easily enforced at law as a document in writing. Unfortunately, men are in such matters too often forgetful and careless. They do not pay attention to what is said to them, and forget what they said in reply, and it is consequently very common to find the parties to a verbal contract a few weeks afterward differing widely, although perhaps conscientiously, as

to what it was that they mutually agreed to do. In case of a controversy on the subject the testimony of one party about the agreement, if no fraudulent intent is apparent, is just as good as that of the other, and whether a jury decides that one party is wholly right, and the other wholly wrong, or strikes an average between the two claims, as it is more disposed to do in doubtful cases, there is sure to be disappointment on one side or the other. Architects, who are accustomed to hearing the conflicting assertions of their clients and the contractors as to what agreements or promises have been made during the progress of works under their charge, hardly need examples of the distortions which the remembrance of facts will suffer under the influence of self-interest; but it may be well to remind them of the numerous instances in which members of their profession, after having done work in pursuance of a verbal engagement, have been met, on presenting a bill for their services, with the answer that the party who employed them perfectly well remembered that they had agreed to render those services for nothing. In many cases the employer honestly believes this, basing his belief perhaps on some remark or action of the architect which neither can accurately recall, and if the architect fails to convince the other of his error, or refuses to accept a compromise in the matter of his bill, he must be prepared to hear his employer swear in court solemnly, and in good faith, to facts which never existed outside his own imagination. To do the courts justice, they are generally unwilling to believe, without better evidence than unsupported assertion, that any professional man would be foolish enough to spend his time and skill for nothing; but, to use the words of an American judge, if two equally credible persons give directly opposite testimony, the testimony of one "neutralizes" that of the other, and the architect who is so unhappy as to become involved in a dispute in which he has nothing but his recollection of a verbal agreement to rely upon is likely to find the compensation which he recovers measured by something more than the residue which remains after deducting his opponent's claims from his own.



There will be much more to say upon this subject when we come to the relations of the builder with the other party to his contracts, but architects will do well to take notice that as they are more likely than builders to make their contracts orally, so, the results of their labors being less tangible than those of the builder's work, they are often worse prepared to convince a jury of the justice of their claims.

The best remedy for the inconveniences and dangers of verbal contracts lies in the provision of written memoranda, which will not only serve to refresh the memories of the parties themselves, but, if a controversy in regard to the contract should be brought into court, will be of the greatest importance as evidence. In fact, so great is the value which the law attaches to writing, that if either party can produce a letter or written memorandum of any kind which goes to show what the terms of an agreement were, a court will generally decline even to listen to a witness who endeavors to refute, by quoting mere conversations, the evidence afforded by the written document. It is not necessary that the writing should be in the shape of a formal contract. Letters, with replies to them agreeing to the terms proposed in them, are excellent evidence of the intention of the parties, and an agreement made in this way cannot easily be broken by either party. So also, if an architect, for example, should write to an intending client, mentioning his terms for his services, or, as is often done, enclosing a tariff of prices, and the other should not at the time make any objection, but should request the architect to proceed with the work, and should suffer him to carry it to completion, the letter would be regarded as showing the terms agreed to between the parties, and only strong and direct evidence of its having been verbally set aside would be admitted to contradict it. Even if the person to whom the architect offered his services on certain terms should not actually request him to render those services, but should offer no objection to his doing so, and confer with him or otherwise recognize his actions as the work went on, and should at the end profit by his labors, he would be assumed,

unless he could show evidence to the contrary, to have agreed to the terms which the architect proposed at the beginning.

In default of formal agreements, or of terms submitted in writing by one party, and either expressly or tacitly acquiesced in by the other, a comparatively vague memorandum of the agreement, or of the understanding existing at the time between the parties, will be much better than nothing, and will give the one who can produce it a great advantage over persons who have nothing to depend upon but their own assertions in regard to the circumstances, which are very likely to be flatly contradicted by the assertions of the opposing party. In such cases, even a memorandum of the terms agreed to, or the request made by the party to be charged, or of any other item of the understanding between the parties, made by the person who afterwards desired to profit by it, would be far better than nothing, and if he could satisfy the jury by the examination of the note-book in which it was written that it was made at the time, and in good faith, he might find it of considerable service.

Still better than this, in the case of a verbal contract of any kind, is a note of the circumstances of the agreement, made by a third party, especially if the third party was a person familiar with the subject-matter of the contract, and was present when the verbal agreement was made, and took note of it at the time in writing. In the absence of a written document signed by the parties, or of a letter from one of them expressing the terms which he offered, with written or tacit acceptance of them by the other, such an impartial memorandum would have great weight, and could hardly be contradicted by the mere recollection of one of the parties. Although architects are not, perhaps, likely to need such testimony very often in their own behalf, they may be of great service to their clients by remembering the value of it, and acting themselves as the impartial takers of notes in regard to bargains made between their clients and others in their presence. As all architects know, the approaching completion of a building, particularly of a dwelling-house, usually serves as the signal for a multitude of minor agreements,

relating to grading, planting, furnishing and other matters. Although the proprietor commonly makes his own bargains for these matters, the architect is frequently consulted about them, and is in consequence often present when the agreements are made, and, as the agreements are almost always verbal, and consequently liable to be misunderstood or partially forgotten on one side or the other, the architect can help both parties, but his client more particularly, by writing down the items of the bargain, with the date and other important circumstances, in such a way that his note can be subsequently referred to. It is an excellent precaution, also, particularly where one of the parties is a gardener or contractor, not much used to exact expression, to read the memorandum to the parties, and ask them if that is their understanding of the agreement, adding to the memorandum a note of this question and the reply.

As in most of their worldly affairs, so in the making of contracts, men are generally in too much of a hurry for their own good, and forget, or leave out, or stumble vaguely over, or postpone for future consideration, the very points which it is most necessary for them to have most clearly understood. Some persons are afflicted with an excessive timidity or politeness, which leads to an habitual foggiess of expression in their business dealings, as if they feared to wound the feelings of others by a brusque directness of demand or reply, and many more, under the influence of a craftiness which is not incompatible with timidity, habitually conceal their real intentions, and make their bargains in vague terms, to which they hope to be able later, after they have been accepted, to ascribe a meaning very different from that which the party who accepted them had in mind, and much more advantageous to themselves. It is true that the courts generally make short work of these astute practices, and it is often laid down on the highest authority that the true interpretation of an agreement, and the one to which the law must give effect, is that interpretation which the man who proposes the agreement thinks that the

person to whom he proposes it puts upon it at the time; or, to say the same thing in another way, any uncertain or incomplete expression in a contract must be understood in the way in which he who proposed the contract thought that the other party then understood it; but, although architects will do well to remember this, which is the rule by which the law interprets contracts, when they have to decide between their clients and their contractors in regard to imperfectly defined stipulations, they should beware of admitting any such incomplete or ambiguous expressions to their own negotiations with either client or contractor. The principle to be always borne in mind is to describe all the stipulations on which it is desired to insist as plainly as possible, leaving nothing to be inferred or supplied. Architects are apt to fear offending their clients by appearing too anxious, at the beginning of their relations, about their fees, but a man of moderate tact need have no apprehensions on this point, and for one client who really intended to pay a proper fee, and who was driven away by being asked to signify his intention plainly at the outset, there would be a thousand who would be glad to start with a definite understanding between themselves and their architects as to the services to be rendered, and the compensation to be paid for them.

Taking things, however, not as they should be, but as they are apt to be, we must see what the law will do for a man who neglects to protect his own interests by saying distinctly what he proposes to do, and what pay he expects for doing it, and by getting the assent of the other party to his proposition, before he enters upon any undertaking.

If a person should be so very foolish or careless as to agree to what he did not intend, either by reading the proposition submitted to him carelessly, or not reading it at all, as sometimes happens, he will get no help from the law in trying to avoid the obligations which he has inconsiderately undertaken. No matter how oppressive or harsh the terms may be to which he has given his assent, the courts will enforce them strictly, if they do not demand anything impossible or illegal, or if no

fraud can be shown to have been practised upon the party who seeks relief. To use a judge's words, the law cannot make a new contract between the parties: by writing and signing the terms to which they agree, they establish a law unto themselves; and courts, in the absence of illegality, impossibility or fraud, can only give effect to their own terms, defining them, where they are obscure, but not altering them. Even where one of the parties has signed a written agreement upon the verbal representation of the other that certain objectionable clauses will not be enforced, or will be interpreted in some favorable, but not obvious way, he is likely to find that these encouraging promises will be forgotten when the time comes for carrying them into effect, and that he is bound to the strict letter of the contract; the rule of law being that verbal explanations, modifications or understandings in regard to the subject-matter of an agreement are abolished and annulled, or rather, absorbed, by the written contract, which is presumed to be the final and perfect expression of the intentions of the parties. So strictly is this rule maintained that evidence to show that either party promised verbally to waive one of the stipulations, or not to enforce another except in certain contingencies, or to regard a third as "a mere form," is not even listened to in court, where nothing but the exact letter of the agreement, interpreted by the aid of common-sense and the dictionary, receives any attention. Illustrations of this will be given later, in treating of contracts with builders.

Where a contract, whether written or verbal, fails to describe all the duties of the parties to it, the law will supply certain stipulations to fill vacancies. Thus, if, as often happens, an architect is engaged to perform certain services, without any agreement between him and his employer as to the compensation to be paid him for those services, the employer is by law presumed to have agreed to pay a reasonable price for them, and can be compelled by legal process to pay this reasonable price. It should be observed, however, that in order to put a person under obligation to pay for services rendered him, it

must be shown that he asked for them, or, at least, that he accepted the benefit of them, which is in law equivalent to a prior request. The legal principle is that no man can make another a debtor to him against his will, and voluntary proffers of sketches or other services impose upon the person to whom they are offered no obligation to pay for any of them, unless he has previously promised, as is usual in competitions, to accept one or more; or unless he accepts one of his own accord, or makes such use of it as to show that he derived some benefit from it. In either of these cases he is bound, unless he has made some agreement to the contrary with the person whose work he wishes to avail himself of, before he accepts it or takes the benefit of it, to pay what such services are fairly worth. Perhaps the cases to which architects are parties involve this principle more frequently than any other. The loose way in which competitions are carried on, with the carelessness of some architects in volunteering services which they are not sure of getting paid for, have led to an uncertainty in the matter of an architect's employment which is unknown in other professions. No one, for instance, imagines that a lawyer or doctor would spend his time and skill in preparing briefs or prescriptions which were not to be paid for unless satisfactory, and with them the evidence of the service rendered is usually all that is necessary for securing payment; but architects often find their efforts to obtain compensation for their work resisted by a claim that their services were only to be paid for if accepted, or that they were, by special agreement, to be rendered gratuitously.

It is unfortunate for the profession that this claim is in some instances well founded; and the practice indulged in by certain architects, of volunteering plans, or soliciting opportunities to "submit sketches," although it has, in years past, been sanctioned by rather illustrious examples, tells seriously against the conscientious men who believe that all their work ought to be paid for at a fair price; and in the end injures the speculators themselves, who find their assertions discredited

when they really believe themselves to have been legally employed.

Dunton  
vs.  
Chamberlain,  
1 Bradwell, 361.

When cases of this kind come before the courts, it is for the jury to decide from the evidence whether the work was volunteered, or done in return for a promise that it should be paid for; and, in general, it will be necessary for the architect to give some proof that such promise was made, or that he did the work in accordance with such a request of the other party as would imply a promise to pay for it. An architect in Illinois, a resident of a certain village, was once called upon by a member of a committee, who told him that the citizens of the town intended to build a factory, and present it to a firm of manufacturers, as an inducement to the firm to remove its business to the place; and the visitor proposed that the architect, as his contribution to the cause, should prepare the plans and specifications for the building. He did so, and afterwards sued the committee-man for payment for them. The court found that no promise was shown on the part of the committee-man to pay for the plans, and that the architect could recover nothing. In a recent case, an architect, meeting frequently the principal manager of an operatic company, became interested in the plans of the company, and made drawings for an opera-house in accordance with the suggestions of his friend, who promised to use all possible influence to have them adopted by the company. Nothing more coming of the matter, the architect sued his enthusiastic acquaintance for payment for the drawings, but was defeated, on the ground that no promise had been made to pay for them.

Nourry  
vs.  
Lord,  
3 N. Y. Ap., 392.

On the other hand, if a promise is really made, or any inducement held out, by which an architect is led to spend time and trouble, he has only to show this to the satisfaction of the jury, and the court will see that he is paid. In a New York case one Nourry, an architect, sued the owner of a lot on Broadway for the value of his services in making plans for the improvement of the lot. Nourry, corroborated by another witness, testified that he was employed to draw plans for a build-

ing to be erected on the lot, and did so, and submitted them. The defendant said that Nourry came to him with an introduction, and said that he would like to show him what he could do, and would draw some plans and submit them to him. He replied that his intentions as to building were entirely unsettled, and that Mr. Thomas was his architect. Some time later, Nourry brought a lot of drawings to show him. He told him that he thought they were beautiful plans, but not adapted for use; and soon after, Nourry sent and took them away. He denied that Nourry had ever been employed by him in any way. In this case the jury believed that the conversation between the parties amounted to an employment, and the court ordered judgment for the architect.

A very common way of engaging the services of an architect is through advertisement. A person, or, more commonly, a public body, wishing to build, advertises in the newspapers, or sends out circulars, inviting architects to send in competitive designs, and proposing certain inducements, usually in the way of a prospect of employment, for them to do so. Where this is done, every architect who prepares and sends in designs in accordance with the terms of the circular is thereby made a party to a valid contract between himself and the parties issuing the circular or advertisement, which he can enforce in any court, if the advertiser is responsible for his actions, or is authorized to bind any one else. This last is an important reservation, as committees and public officers often exceed their authority in such matters, and their dupes find, after it is too late, that no one is bound by their action. Details on this point will be given later, in treating of builders' contracts.

Where the advertiser is responsible for his acts, or is properly authorized to act for some one else, the stipulations of the contract between him and any or all persons who comply with the terms of his invitation are precisely those of the written or printed invitation or advertisement, without variation or modification of any kind.

If this principle were more fully recognized by competing

**Nourry vs.  
Lord, 3 N. Y.  
Ap., 362.**

**Contract  
through Ad-  
vertisement.**

**Symmes vs.  
Frazier,  
6 Mass. 344.**

**Loring vs.  
City of Boston,  
7 Metcalf 409.**

**Wentworth vs.  
Day,  
3 Metcalf 352.**

**Gilmore vs.  
Lewis,  
12 Ohio 281.**

**Hunt vs.  
City of Utica,  
18 N. Y. 442.**

**Pierson vs.  
Moroh,  
82 N. Y. 503.**

**Ryer vs.  
Stuckwell,  
14 Cal. 134.**

**McLeod vs.  
Meade,  
77 Cal. 87.**

**Furman vs.  
Parke,  
1 Zabriskie 310.**



England vs.  
Davidson,  
11 A. & E. 856.

Lancaster vs.  
Walsh,  
4 M. & W. 16.

Williams vs.  
Cowardine,  
4 B. & Al. 621.

**Strict Ad-  
herence Nec-  
essary to  
Terms of  
Competition.**

Walsh vs. St.  
Louis Exp.,  
16 Mo. App. 502.  
Affirmed,  
90 Mo. 459.

architects, and by the promoters of competitions, and more energetically enforced by persons who suffer from the violation of it, architectural competitions would be much more satisfactory affairs than they are now. There is no question that where the time for submitting designs is limited, or where the proposed cost is restricted, or the details of accommodation specified, or the scale of the drawings, or the manner of rendering, exactly defined, only those designs which fulfil the conditions are entitled to be considered, and their authors could probably prevent, by injunction, the consideration of any which did not comply with the instructions, or, if one should be chosen which violated the stipulations, could very possibly recover damages for the breach of the contract made with all of them by the failure to award the premium in the manner agreed.

The most important case of the kind which has yet been decided in this country involved a slightly different point, the plaintiff having been deprived of the advantage promised by the invitation, after his plan had been adjudged to be the best.

The St. Louis Exposition and Music Hall Association, through its Secretary, sent to Mr. Thomas Walsh, among other architects, a document reading as follows :

"DEAR SIR, — At a meeting of the Board of Directors of the St. Louis Exposition and Music Hall Association, held on the 18th day of April, 1883, the following resolutions were adopted :

"*First.* That all architects, residents of this city, and five non-residents, be invited to prepare and submit designs.

"*Second.* That from those presented by residents, seven, which shall be considered the most meritorious, shall be accepted and awarded five hundred dollars (\$500) each, and the five presented by non-residents shall each be awarded the same amount. All designs for which you pay five hundred dollars (\$500) shall be the property of the Association.

"*Third.* That it should be understood that any foreign architect may submit a design, but if not accepted as the most meritorious of all, he will receive no compensation, and his design shall be returned.

"*Fourth.* The architect who is successful shall not receive five hundred dollars, but he shall be engaged as architect and superintendent, and shall be paid, for performing such duties, the usual commissions as adopted by the American Institute and the St. Louis Institute of Architects.

"*Fifth.* That all architects entering for competition shall so notify the president or secretary on or before May 5, 1883."

There were other stipulations, as to scale of drawings, etc., and one that the cost should not exceed \$400,000.

Mr. Walsh prepared drawings in accordance with this document, and his plans and "specifications" (perhaps description) "were," as his petition said, "upon examination and consideration by the defendant and its Board of Directors, considered and declared as the most meritorious of all those that had been submitted to it under said proposal, and that the same were accepted by said defendant as such, and thereby the plaintiff became and was the successful architect within the purview and meaning of said proposal; and the plaintiff says that the defendant, after so accepting his designs, plans, elevations, sections and specifications, retained the same, and still retains the same, and is now using the same, in part, in the construction of the building."

The petition further averred the plaintiff's tender and offer to assume and perform the work of architect and superintendent, and his present readiness and willingness to assume, perform and discharge the same, and asserted that "the defendant, wholly unmindful of and in disregard of its just and legal obligations and duty in the premises toward the plaintiff, has refused, and still does refuse, to engage the plaintiff as architect and superintendent as aforesaid, to the damage of the plaintiff in the sum of twenty thousand dollars."

The Circuit Court sustained the defendant's demurrer to this petition, on the ground that it did not state facts sufficient to constitute a cause of action. No question was raised as to the sufficiency of the proposal and acceptance to constitute a binding contract, but the defendant objected that nothing in its proposal implied an obligation, in any event, to employ as architect and superintendent the person whose design should be found the most meritorious or acceptable of all that might be submitted, and that, therefore, the plaintiff had no right of action for the defendant's refusal to employ him.

Walsh vs. St.  
Louis Exp.,  
16 Mo. App. 502.  
Affirmed,  
90 Mo. 459.

Walsh vs.  
St. Louis Exp.,  
16 Mo. App. 502.  
Affirmed,  
90 Mo. 459.

The plaintiff contended that such obligation appeared in the fourth clause of the proposal, which said: "The architect who is successful shall not receive \$500, but he shall be engaged as architect and superintendent," etc.

The case was taken to the Court of Appeals, which, after reviewing the facts, said: "The question is, then, who is the person intended by the expression, 'the architect who is successful,' and to whom the promise is made that he shall be engaged as architect and superintendent upon the terms specified?" The defendant answered that the expression meant, not the architect presenting the best plan, but the one who should be, in fact, employed by the defendant. "In other words," said the Court, that "the defendant means only to promise that the one who shall be, in fact, employed as architect and superintendent shall 'be engaged as architect and superintendent.' The unreasonableness of this interpretation is not limited by its imputation of tautology and surplusage. The whole tenor of the proposal demonstrates that no such application of the words was thought of in its framing." Again, the Court said, "by the plain words of the proposal, the offer of the superintendency is held out to the architect who shall surpass all others in the excellence of his design." "That this stimulus is intended for all is obvious from the reading of the first, second and third clauses."

The defendant's counsel argued that it could not have intended to bind itself to an appointment of the successful competitor as superintendent of the work, because that might necessitate the appointment of one personally unfit to be entrusted with such a position, but the Court said that this idea was "entitled to no consideration upon a demurrer to the petition." The judgment of the court below was reversed in favor of the architect. The Music-Hall Company appealed the case again to the Supreme Court of Missouri, which affirmed in every respect the decision of the Court of Appeals.

The experienced reader will probably not agree with the court in thinking that the expression, "the successful archi-

tect," was used in the invitation without any thought of its possible uncertainty of meaning. So many tricks are played upon architects by means of expressions which they are intended to interpret in one way, but which the other party interprets later in another way, to their disadvantage, that it is hard to believe that this one was employed without the idea that it might be utilized, if desirable, to escape just obligations towards the architects who might be misled by it. However, any suspicion of fraud will tell very seriously against the party which tried to take advantage of it, and the court took the most favorable view that it could of the intentions of the Music Hall Company.

A contract of this kind, formed by a proposal or invitation on one side, and compliance with its terms on the other, has been decided to be a contract in writing, and, therefore, not subject to the provisions of the Statute of Frauds. This is an important decision, as many of the engagements which architects hope to obtain through competition could not be completely fulfilled within a year, and a parol agreement to employ them for services intended to extend through a longer period would be void.

Like any other proposal, that made by advertisement or circular may be revoked or modified, provided the revocation or modification is made before it has been accepted by doing work in accordance with it. Very commonly, the terms of competition programmes are changed by subsequent notice, either by extending the time, or in some other way, often at the suggestion of competitors who happen to be on good terms with the promoters. Where such changes are made before an intending competitor has done any work on his plans, the modified terms, if he has received the notice, will form a part of his contract; but those who have done work in accordance with the original programme, which will be made useless by the change, would probably be entitled to compensation for their trouble.

In the case of an extension of time, it would be more

**Walsh vs.  
St. Louis Exp.,  
16 Mo. App. 52.  
Affirmed,  
90 Mo. 459.**

**A Contract  
by Advertisement  
is a  
Written Contract.**

**Ryer vs.  
Stockwell,  
14 Cal. 134.**

**Ellis vs.  
Abell,  
10 A. R. 228.  
(Ontario).**

**Revocation  
or Modification  
of Proposal by  
Advertisement.**

**Extension  
of Time.**

difficult to show damage, but there is no doubt that unscrupulous architects, who have the ear of the promoters of a competition, and who know that the merit of a plan is usually proportionate to the time spent on it, sometimes favor, at the beginning, the restriction of the time within which the designs must be submitted to a very inadequate space, and, at the last moment, when the plans of their rivals have been hurriedly completed, while their own have been progressing quietly and carefully, obtain an extension of time, sufficient to enable them to bring their own well-studied projects to completion, but not large enough to tempt the other competitors to do their work all over again. It is, therefore, highly desirable that no changes should be made in competition programmes after they are once issued, or that architects interested should, as soon as possible after receiving such documents, propose the changes which they think necessary, in order that all the competitors may be notified without delay.

**Acceptance  
must be  
clear.**

In all matters of this kind, the architect must be sure that the proposal made in the circular or letter of invitation is perfectly clear, and that his acceptance of it, by doing work in accordance with it, is no less clear, for the law will not do much to help a man who does not perfectly understand other people's propositions, or who makes his own in a manner not easily comprehended. It is common, for example, for building committees to incorporate in their circulars of invitation to architects conditions which are incompatible with each other, as, for example, setting a limit of cost in one clause, and, in the others, demanding an amount of accommodation which cannot possibly be had for anything like the sum named. In such cases, architects must, at their peril, obtain from the committee a vote, saying which provision is the one to be complied with. It is not sufficient to obtain an individual opinion from a single member of the committee; such an opinion does not bind the committee; and all the architects who keep their designs down to the limit of cost are liable to have them rejected, because they do not give the accommodation desired, while those who

**Incompat-  
ible Condi-  
tions.**

provide the accommodation are equally liable to be thrown out because the execution of their designs will cost too much; and in neither case will they have any redress; while the committee, having obtained all the suggestions and information that it wanted, is free to engage the architect whom it had all along intended to employ.

Even where no fraud on architects is intended, the instructions for competitors are often so carelessly drawn that it would be difficult to enforce any rights under them, as, for instance, in a Chicago competition, where the area of each room was specified, and nearly twice as much space was required on the second floor as on the first. It would obviously be difficult to comply with this condition, yet an architect who violated it might find it hard to hold the promoters of the competition to the other stipulations of the proposal.

Again, the terms of the choice or acceptance of a design are often so vague as to mislead architects. The County Commissioners of Cook County, and the Common Council of the city of Chicago, arranged to build jointly a court-house and city-hall, united in one grand structure, and invited competitive designs, offering several prizes in money. The majority of the joint committee representing the city and county awarded the third prize, of \$1,000, to Mr. Tilley. The city and county authorities confirmed the award, by a resolution, which, however, provided that "nothing herein or in said report contained shall be construed as indicating a preference for either of said plans as to which shall be finally adopted, from which the said building shall be erected." Mr. Tilley was paid his prize-money, and, soon after, the County Commissioners and the City Council adopted, each separately, the following resolution:—

"That the plan known as 'Eureka,' (Tilley's) or number five (5) in the collection, be, and is hereby, selected and adopted as the plan after which to build such court-house and city-hall, (the Board of Commissioners of Cook County concurring), subject to such changes and modifications as may

**Terms of  
Choice of a  
Design.**

Tilley vs.  
Cook Co.  
13 Otto, 155.

*Tilley vs.  
Cook Co.,  
13 Otto, 155.*

hereafter be determined upon by the common council of the city of Chicago and the county board, provided the estimate of the architect who presented said plan as to the cost of construction of the building shall be verified."

Tilley then went over his figures of cost again, without being asked to do so. Soon after, differences arose between the city and county authorities, and the county appointed another architect. Tilley then sued the city and county jointly for five per cent on the estimated cost of the building, his bill, as presented, amounting to \$145,481.45. He proved, at the trial, that he had verified the cost, and was confirmed as to the correctness of his estimate, of thirty-five cents per cubic foot, by several architects. He offered to prove the cost and value of his plans; that by the usage and custom of architects, in the absence of a special contract, the superintendence of the construction of a building belonged to the architect whose plans were adopted; that, by the usage and custom of architects, where prizes for plans were offered, the plans of the successful competitors belonged to them, and, if subsequently adopted as the plans to build by, were always paid for in addition to the prize itself; and he offered evidence to establish the value of his services in verifying the estimated cost.

All this evidence was excluded by the court. There was no evidence that his plans were ever used, or that any contract was made with him beyond the adoption of the resolution quoted above. The court held that the adoption of this resolution "was not a proposition, but simply the expression of a purpose to build their structure after the plans of the plaintiff, subject to such changes and modifications as might thereafter be determined upon by the Common Council and the County Board." "The resolution was not adopted at his instance or suggestion." He did no act, nor did he give any assent. "There was no mutuality, and, therefore, no consideration, both of which are necessary to a contract." The resolution might have been reconsidered and rescinded the next day, and the architect might have refused to furnish his plans and superintend

the building. The Council and Board would have had, in that case, no claim against him, and he, in return, had none against them.

*Tilley vs.  
Cook Co.  
13 Otto, 155.*

As to the custom of architects which he offered to prove, the court thought that it really was that, if the building was erected according to his plans, he was entitled to pay for them. "That would be such an acceptance and adoption of his plans as would give him the right to compensation therefor, and the right to superintend the erection of his building and receive the usual remuneration;" but a custom which bound a person who merely announced his intention to build in accordance with a certain plan, to pay for it if he did not use it, and to pay its author for superintending a building never erected, would be absurd and unreasonable, and, therefore, not binding. If the plaintiff had offered to show that after the passage of the resolution the defendants had erected their building according to his plans, then the evidence of the custom would have been pertinent. As to the evidence of the value of the work expended in verifying the cost, the court held that there was no implied contract to pay for services voluntarily rendered by the plaintiff, and of which no use was made by the defendants, and the evidence was properly excluded.

It may be said that, in general, courts do not look with much favor on competitions. If architects choose to enter contests in which no definite promises are made to them by responsible parties, the law will not supply the promises; and judges are quite ready to believe, from their own observation, that architects are willing to do a good deal of work without them; and, as in Mr. Tilley's case, they will give no help in recovering pay for volunteered service. An architect in Missouri made plans for a building, and took them to the owner of the land, who told him that, if he built, he would employ him as architect. Afterwards the owner employed another architect. The first one sued for compensation for his plans, but was defeated, the court holding that nothing was due him for his services. These services, it said, were rendered "under hope of being

**Volunteered  
Service.**

*Allen vs.  
Bowman,  
7 Mo. App. 29.*

*Druiding vs.  
Lyon,  
7 Mo. App. 193.*



employed to superintend," and the owner was not bound to make any return for them.

**The Value  
of Competi-  
tive Draw-  
ings.**

**Adams Ex-  
press Co. vs.  
Egbert,  
36 Penn. St. 360.**

A case of a different kind, of considerable importance for architects who engage in competitions, may close this part of the subject. The Trustees of the Touro Almshouse, in New Orleans, advertised for competitive designs, offering a single premium of \$500. In response to the advertisement, Dr. Egbert delivered to the agent of the Adams Express Company at Carlisle, Pa., a set of plans, to be transmitted to New Orleans, and prepaid the freight. The agent of the express company omitted to mark the package prepaid, and when it arrived at its destination the Almshouse Committee refused to pay the freight. Some months later, after the competition had been decided, and the \$500 awarded to some one else, the mistake in marking the package was discovered, and the box again sent to the committee. At the request of the express company, the committee was convened to consider the plans, and found that they were unsuitable, not having sufficient provision for ventilation, and that they would not have received the prize in any case. The jury in the court below, when Dr. Egbert sued the express company for damages, awarded him \$375. The Supreme Court reversed the decision. Egbert's counsel cited an English case, in which a prize had been offered for the best plan and model for a machine for loading coal from barges into vessels, the plans and models to be sent in by a certain day. The plaintiff sent a plan and model, but, through the negligence of the railway company, they did not arrive until after the appointed day. The English court appeared to be of the opinion, although the point was not directly raised, that the proper measure of damages was the value of the labor and materials expended in making the plan and model, and not the chance of obtaining the prize, the latter being too remote a ground for damages. Justice Pattison said that the right principle on which damages were recoverable was that the goods were made for a special purpose, which has been defeated by the negligence of the defendants, and thus they

**Watson vs.  
Ambergate,  
15 Jurist, 448.**

had become useless. The Pennsylvania court, however, thought that if Dr. Egbert's plans were unsuitable, he was not damaged by having them mislaid, and could recover only a nominal sum, and said that, if the plaintiff's competition for the prize had proved unsuccessful, "the time and labor would have been lost, without any breach of the contract."

Adams Ex-  
press Co. vs.  
Egbert,  
36 Penn. St. 360.

The professional reader will be inclined to disagree with the Pennsylvania judge, and to think that Dr. Egbert suffered a real damage by the loss of his plans. Even the unsuccessful competitors in such an affair, if their designs are made with reasonable skill, are benefited by having them shown to the committee or to the public. It often happens that a plan which does not receive a prize, or which is obviously unsuitable, attracts by some quality the attention of persons who keep its author in mind for future employment, and architects who enter much into competitions find it for their interest to have their names as widely known as possible. All advantages of this kind Dr. Egbert lost by the negligence of the express company, and it certainly seems as if he were entitled to compensation for them.

## CHAPTER II.

### THE ARCHITECT'S DUTIES TO HIS EMPLOYER.

**The Architect's Position in Society.**

**T**HERE appears to be a difference of opinion among courts as to the position of architects in society. In Minnesota, their relation to their "customers" has been mentioned in a judicial decision, as if they were merchants of some sort; but in Missouri it has been distinctly held that they practise "a liberal profession," and this view appears to be rapidly gaining in favor. As professional men, their duty is plainly laid down in the text-books, and in many decisions of courts. They are bound to serve their employers with reasonable skill and care, and, of course, with perfect honesty. They are not bound to the utmost skill, such as only a few members of any profession attain to, but they must show what other architects will generally consider to be a reasonable degree of professional intelligence and knowledge. The care and attention, apart from the skill, which they should devote to their employer's affairs, ought to be greater than that which they would bestow upon their own affairs of similar character, in order to satisfy the legal idea of their duty; but the testimony of other architects will be admitted to show whether the care used in a particular instance was all that could reasonably be expected of a conscientious architect under the circumstances.

**The Skill and Care Required of Architects.**

As might be supposed, the testimony on these points in different cases varies considerably, and, as precise information in regard to decisions actually made is of great importance to architects, it seems advisable, even at the risk of making this

chapter rather long, to quote enough from actual decisions of courts of record to show what the judges and the witnesses think under given circumstances; and, in one or two instances, where the architect's side was less favorably presented by his counsel than it might have been, to add some comments, in the hope of assisting the cause of justice in similar cases in future.

In an Illinois case, an architect was employed, by an oral contract, to prepare the necessary plans and specifications for a block of buildings, and to let the contracts for the various portions of the work, and superintend the erection. Shortly after the completion of the block, it was discovered that, in consequence of the imperfect construction of certain dwarf walls, upon which the interior portions of the buildings rested, the floors and interior structure had settled several inches, so as to render the buildings untenable. The owner thereupon caused them to be repaired and put in proper condition, at a cost of about \$2,900, and afterwards brought suit against the architect for about this amount, as damages on account of his negligence. At the first trial, before a jury, a verdict was rendered for the plaintiff, awarding him \$1,441.76, and judgment was entered accordingly. The plaintiff claimed that the defects in the walls "arose from their improper construction, and that such construction was permitted by the defendant negligently, and in violation of his duties as superintendent." The architect asserted that after the walls were built, deep trenches were dug, partly near and partly beneath the walls, for the purpose of laying sewer-pipes and constructing cold-air ducts; "that said ditches were carelessly and imperfectly filled with frozen earth by the workmen in charge of that part of the work, and that the digging and filling of said ditches in that manner was carried on and persisted in by said workmen, with the tacit, if not the express approbation of the plaintiff, in spite of the defendant, and contrary to his express directions and protests." The evidence on these points was conflicting. The judge of the inferior court, at the instance of the counsel for the plaintiff, gave to the jury the following instruction:

**What are  
Reasonable  
Skill and  
Care.**

*Vigant vs.  
Scully.*  
20 Bradw. 437.

*Vigant vs.  
Scully,  
20 Bradw. 437.*

"The jury are instructed, as a principle of law, that if a person employs an architect to draw plans for him, and superintend the proper erection of buildings, and such architect is made the superintendent in the contracts between the owner and the contractors, it is the duty of such architect to exercise proper skill and care in the superintending of such buildings, and such superintendent should issue no certificate to any of the contractors, unless such work appears, upon a proper inspection, to be properly done, and to conform to the requirements of the respective contracts, plans and specifications, unless otherwise directed by the owner."

The case was appealed to the Appellate Court of Illinois, and the judges of this court commented upon it in the following language:

"The contract by which the plaintiff employed the defendant to act as architect and superintendent was not in writing, and the precise terms of said employment are not very clearly shown. The plaintiff testifies, in substance, that he instructed the defendant to draw up plans and specifications, and let the contracts, and he admits that these duties were satisfactorily performed. He further testifies that the defendant agreed to superintend the erection of the buildings, and see that they were put up right; but admits that the details of his duties were not discussed, and that nothing was said as to how much time he was to spend at the buildings, or what he was to do there, or what was to be his compensation.

"The contracts between the plaintiff and the various contractors and builders were in writing, and provided, among other things, that each contractor should do his part of the work and furnish the materials therefor, agreeably to the drawings and specifications made by said architect, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of said architect, to be evidenced by a writing or certificate under his hand, and to be paid for as the work should progress; provided, that in each case the contractor should obtain a certificate from the superintendent or architect, who should in

“every case retain fifteen per cent from each estimate, such  
 “fifteen per cent to be paid when the building should be  
 “completed and accepted; but that no certificate should be  
 “issued by said superintendent and architect unless the material  
 “should be on the ground, and the work performed in the build-  
 “ing. The right was reserved to the plaintiff to make such  
 “changes in the plans of the buildings as he should see fit during  
 “the progress of the work, and it was provided that in case of  
 “any difference of opinion between the plaintiff and contractors  
 “in relation to the contract, the work to be performed under  
 “it, or in relation to extra work, or to any alterations in the  
 “plans, drawings or specifications, the decision of said architect  
 “should be final and binding on all parties.

Vigeant vs.  
 Scully,  
 20 Bradw. 437.

“The defendant, on his part, testified in substance, that at the  
 “time he was employed by the plaintiff as architect and super-  
 “intendent, nothing whatever was said between himself and  
 “the plaintiff in relation to his duties in superintending the  
 “work on the building, and that he only undertook to give such  
 “superintendence as an architect usually gives; that by univer-  
 “sal custom among architects throughout the country, the  
 “employment and duty of an architect in superintending the  
 “erection of a building consist in acting as a general adviser,  
 “director and interpreter of the plans, and in most cases as an  
 “umpire; that he must stand ready to answer questions, and if  
 “any defect be called to his attention he must give directions to  
 “have it remedied; that he should see the bottom of the exca-  
 “vations before the foundations are put in, but that the number  
 “of visits to the building, and the times of making them, are  
 “left to his judgment; that, as the work progresses, if anything  
 “is brought to his attention by the owner or contractor, or by  
 “personal observation, it is his business to take proper steps in  
 “relation thereto, and notify the contractor; that before issu-  
 “ing certificates he should visit the building, and see how much  
 “work had been done; and before issuing his final certificate  
 “he should examine the work, but only so far as can be seen  
 “without tearing anything down; that if there is anything to

*Vigeant vs.  
Scully,  
20 Bradw. 437.*

"excite his suspicion, he is to withhold his certificate until the objection is removed, or adjusted by money differences, it being sometimes impracticable, where inferior work is done, to get it removed, and in such cases settlement must be made by deducting for inferior work; that on important buildings it is usual to have constantly at the work an overseer employed by the owner, acting under the direction of the architect, but that it is not usual to employ such overseer on such buildings as those in question in this suit."

The Appellate Court said that, the nature and extent of the architect's duties being in controversy, he was undoubtedly bound to exercise reasonable care and diligence in the performance of his duties, whatever they were; but what they were was a question of fact, and not of law. Hence, the instruction to the jury was erroneous. Without directing the jury to pass upon the controverted question of fact, and determine what amount of care the defendant bound himself to bestow upon the work, it said that he was bound "to exercise proper skill and care in superintending the buildings," virtually leaving the whole matter of what it was "proper" for the defendant to do to the judgment and caprice of the jury, unrestrained by the evidence in the case. "The jury, being wholly without a guide in the matter, may have been of the opinion that 'proper' care involved the necessity of the defendant being constantly present as the building progressed, or of performing many acts which were entirely outside the purview of his employment as shown by the evidence."

The instruction as to inspecting the work before issuing certificates was also wrong, as imposing a duty not imposed by the terms of the contract, and not contemplated by the parties. The judgment was reversed, and the cause remanded.

**Architect's  
Duty to be  
Ascertained  
by Evidence,  
not by Ca-  
price of Jury.**

The point that the question of what it is "proper" for an architect to do under given circumstances is not one to be left to the caprice of juries, or, we might add, of judges, but is a matter to be determined by evidence, is a very important one. In a New York case, Petersen, an architect, agreed

with one Rawson to draw plans, sections, elevations, etc., and to superintend the progress of a new dwelling-house, which Rawson intended to build in the city of New York, for the sum of \$500. The contract with the mason provided that he should "lay out his work himself." The sills of the front first-story windows were set  $2\frac{3}{4}$  inches higher from the floor than those of the rear windows on the same story, although they were intended to be at the same level. The balcony in front of the house, possibly in consequence of the mistake in the sills, was set too high, and the first step to the front door was too low. When the finish was put in, the trim of the front first-story windows cut into the plaster cornice, injuring the appearance of the room. Petersen refused to give the mason his final certificate, amounting to \$1,900, on account of these mistakes, but the owner paid the mason in full without a certificate, and refused, on account of these mistakes, to pay the balance due the architect, who brought suit for it. The case was turned over first by the court to a referee, who found by the witnesses that the architect was "diligent in his attendance upon the building." Two architects testified that if the building had been properly superintended, the mistake in levels of sills would have been discovered "when the second-story beams were on," or "when they began to lay the brown-stone in front." One architect testified that "it is impossible to say when the error should have been discovered. It might have passed the observation of the architect till the building was completed. It is an error likely to pass any one's observation. It would most likely pass his notice until the cornices were put up."

The referee reported that the plaintiff "had bestowed as much personal attention upon the building as was necessary, and that the variations mentioned were not caused by carelessness, negligence or inattention on his part." The General Term of the Superior Court reversed the judgment of the referee, and found for the defendant. On appeal, the Court of Appeals reversed the judgment of the Superior Court, and ordered

Petersen vs.  
Rawson,  
34 N. Y. 370.



**Petersen vs.  
Rawson,  
34 N. Y. 370.**

**Not Archi-  
tect's Duty to  
Ascertain  
Accuracy of  
Work.**

judgment for the plaintiff. The Court said, "It," (the defect),  
 "arose from the masons not having accurately conformed to  
 "the specification and plan. Was the plaintiff responsible for  
 "this fault of the masons? The plaintiff agreed to make plans,  
 "sections, elevations, specifications, and to superintend the  
 "progress of the building to be erected. It was not his duty  
 "to do the work. The agreement between the defendant and  
 "his masons provides that the masons shall well and sufficiently  
 "erect and finish the building in question agreeably to draw-  
 "ings and specifications made by Frederick Petersen. It was  
 "not the duty of the plaintiff to lay out the work, as it is  
 "technically termed. This, it was expressly provided, should  
 "be done by the mason, who agrees to 'lay out his work him-  
 "self.' The plaintiff was bound to furnish the plans, specifica-  
 "tions, sections, and elevations, and the mason was bound to  
 "lay out the work. In other, but perhaps not plainer words,  
 "the plaintiff was bound to put down, and to show on paper,  
 "how every part was to be built, and the mason was to stake  
 "it out, measure his lumber, and make actual measurements  
 "on the ground and in the erection for such building. I do  
 "not think it was the duty of the plaintiff to measure the joists  
 "or timber of which the different stories were to be constructed,  
 "and to determine by actual measurement that the ceiling of  
 "the first story had an elevation of thirteen feet, and the se-  
 "cond had an elevation of eleven feet, or to measure the thick-  
 "ness and depths of the brick or stone walls. He furnished  
 "instructions and information in writing on these points, and  
 "it was the duty of the mason or carpenter to furnish the ma-  
 "terials, to see that they were of the proper dimensions, and  
 "to put them in their proper places.

"The defendant, however, contends that the obligation of  
 "the plaintiff to superintend the progress of the building bound  
 "him to discover and correct the error committed by the me-  
 "chanics. The plaintiff did assume the superintendence of  
 "the erection of the building, as I think he was bound to do,  
 "upon a fair construction of his language, and must meet the

"obligations of his contract. The plaintiff came from day to day to superintend the progress of the work, and while thus superintending, was he bound to have ascertained that the window-sills in the front parlor were  $2\frac{3}{4}$  inches higher from the floor than was authorized by the plan? The referee must have held that the plaintiff was not bound to have discovered this defect. He found that the plaintiff had bestowed as much personal attention on the building as was necessary, and that the variations mentioned were not caused by carelessness, negligence or inattention on his part:

"I do not find it necessary to differ with him.

"The circumstance that the defendant paid the masons the balance due them for the work, when the plaintiff refused them a certificate on account of the defects in question, and which payment he was not bound to make, until the masons presented such certificate, is not important. If the masons neglected their duty, the defendant could certainly have made them respond in damages, and could have withheld the last payment to apply on such damages. The fact, however, that they neglected their duty furnishes no evidence that the plaintiff has discharged his. Each may have been in fault, and each liable in damages, and a failure to prosecute one, or to secure an easy remedy against him, does not discharge the default of the other, nor do I understand that the referee based his decision upon such a theory. The referee places his decision upon the ground that the plaintiff had fully performed his duty, and was entitled to his compensation. The judgment of the General Term should be reversed, and final judgment for the plaintiff entered."

Judge Leonard dissented from the opinion of the court, and said: — "The plaintiff was employed by the defendant to draw the plans and superintend for him the construction of a dwelling-house in the city of New York. . . The plaintiff drew the plans and specifications, and the defendant contracted with the mechanics to perform the work, under the supervision of the plaintiff, and to be paid for only on his certificate of

*Petersen vs.  
Rawson,  
34 N. Y. 370.*

**Dissenting  
Opinion.**

*Petersen vs.  
Rawson,  
34 N. Y. 370.*

"approval. It was the duty of the masons to lay out and execute the work according to the plans and specifications drawn by the plaintiff, and it was his duty to see to it that the masons performed the work properly, and in accordance therewith. It is also insisted that the error occurred by the fault of the masons in laying out the work improperly at the beginning; that it was no part of the plaintiff's duty to lay out the work, and that he is not to be held to that degree of diligence which would make him an insurer of the perfection of the work of the masons. The plaintiff was employed for the purpose of detecting and preventing just such errors and imperfections as have actually occurred. His services were of little use if he could not, with reasonable and ordinary diligence, discover a defect of such importance in the symmetry and regularity of the edifice as that the front windows were higher from the beams of the first floor, and nearer to the beams above, than at the rear windows, as soon as the beams of the second floor were laid, and long before the front wall was completed."

The dissenting opinion, it will be observed, is based upon the judge's own ideal, or, as the Illinois court would call it, caprice, in opposition to the testimony of the expert witnesses. They proved, to the satisfaction of the referee and the majority of the court, that an architect might show reasonable care and skill without discovering at once the defects referred to; the dissenting judge thought he could not, and based his dissenting opinion on his own theory, fortifying it by an interpretation of his own of the contract between the plaintiff and defendant. This contract provided that the architect should draw plans, etc., for the house, and "superintend its progress." The dissenting judge said that under the agreements "it was the duty of the masons to lay out and execute their work according to the plans and specifications drawn by the plaintiff, and it was his duty to see to it that the masons performed their work properly, and in accordance therewith." Even under this forced interpretation of the contract between the architect and owner,

it is not evident why the architect should have to pay for the masons' violations of their contract, in addition to discovering them; or why the owner, after his attention had been called to the masons' blunder, while he had in his hands the means of making them remedy it, or pay him suitable compensation, should be entitled to condone their error, and make them payment in full, and then bring up the same error as a means for withholding money due the architect; but the whole notion that the architect guarantees the compliance of the contractors with their agreements, which still lingers in the mind of the public, and of some inferior courts, appears to be now rejected, as it was in this earlier case, by the weight of the highest judicial authority.

*Petersen vs.  
Rawson,  
34 N. Y. 370.*

The architect of the Northern Hospital, a State building in Wisconsin, was discharged by the Commissioners before the building was completed, and brought suit for the balance of pay due him. The case was brought to the Supreme Court, the question before the court being upon the admission of seven amendments to the Commissioners' answer to the claim. Among other things, the amendments alleged:—

*Shipman vs.  
State,  
43 Wis. 361.*

1. That the building constructed on the plaintiff's plan was not as represented by the plaintiff, and did not answer the purpose for which it was constructed.

2. That by the plaintiff's contract he agreed to furnish to the Board of Building Commissioners correct and accurate estimates of the materials put into the building by the contractors; that the plaintiff's specification required a certain number of feet of iron coil to be placed in the north wing of the building; that the plaintiff negligently certified to the Building Commissioners that the required quantity of coil had been put in, and that the Commissioners, relying on his certificate, paid for it; that in fact a less quantity of coil had been put in; that it was the plaintiff's duty under his contract to know the quantity actually put in; that the Commissioners did not and could not then know the fact; and that it came to their knowledge after the plaintiff's discharge.

*Shipman vs.*  
*State,*  
 43 Wis. 381.

3. That the plaintiff put, or procured to be put, into the building a defective heating apparatus, not such as his contract bound him to see put in.

4. That "by the contract and specifications thereto attached" the plaintiff was to procure to be put into the building certain water-closets ventilating downward, but procured to be put in water-closets ventilating upwards; and agreed to procure to be put in sufficient plumbing, but procured to be put in insufficient plumbing; and agreed to procure to be put on the building a suitable roof, but procured to be put on an insufficient roof.

The court said, in substance, as to the first and second amendments here mentioned, that "the plaintiff made his contract as an architect; and should therefore be held to at least "reasonable skill in his calling, both in planning the building "and in superintending its construction. It may perhaps be "doubted if he should be held responsible for a perfect plan or "for perfect superintendence in every detail of such a building, if such things be practicable. It may perhaps be doubted "if he should be held responsible in damages for all incidental "failures in detail of foresight or of oversight, consistent with "proper architectural skill and reasonable diligence. He did "not guarantee perfection of the plan or perfection of the "building. Under his contract he became an inferior servant "of the State, to perform duties under control of superior "servants of the State, who were, indeed, *pro hac vice*, the "State itself. He prepared plans for the approval of the "Commissioners. They might have rejected the plans submitted, and called for others. They were made the judges of "the plans, and of their sufficiency.

**Architect  
 does not  
 Guarantee  
 Perfection of  
 Plan or Per-  
 fection of  
 Building.**

**Relation of  
 Commissioners  
 and Architect.**

"The Commissioners, not the architect, had to determine "the plan. When the Commissioners accepted the plaintiff's "plan, they ratified it. His superintendence was also subject "to their oversight and control. They were made judges of "the competency of the superintendent. They were made "judges of the sufficiency of his superintendence, and could

“have dismissed him at pleasure. They must therefore be  
 “held to have been satisfied with his superintendence until his  
 “dismissal. Indeed, they seem to have ratified his superinten-  
 “dence, by accepting the building which he had superintended,  
 “without apparent objection. Doubtless there might be defects  
 “in the plans or the execution of them, patent to an expert,  
 “latent to an inexperienced. For such the plaintiff, not the Com-  
 “missioners, might be liable. But so far as the plans were  
 “equally intelligible to the Commissioners and the plaintiff,  
 “and so far as these pleadings disclose, the Commissioners as-  
 “sumed responsibility for the plans when they adopted them.  
 “And so far as defects of construction in the building were  
 “equally open to detection by the Commissioners and the  
 “plaintiff, on the completion of the building, and so far as  
 “these pleadings disclose, the Commissioners assumed responsi-  
 “bility for them when they accepted the building. It is  
 “thought proper to say so much, because this cause bears some  
 “appearance of having grown out of controversy in relation to  
 “their respective duties between the Commissioners and their  
 “superintendent. But what has been said is not to be un-  
 “derstood as an intimation that failure of the Commis-  
 “sioners in their duty would under any or all circumstances  
 “excuse the plaintiff’s want of adequate skill or reasonable  
 “diligence in the performance of his duty. He may, notwith-  
 “standing what the Commissioners may have done or left un-  
 “done, be liable to the State for damages resulting from unskil-  
 “fulness or negligence. But there is certainly nothing here  
 “pleaded on which such liability of the plaintiff can be sus-  
 “tained.”

In regard to the amendments here numbered 3 and 4, the court said, “All this appears to confound the plaintiff’s con-  
 “tract to furnish plans for the building, and superintend its  
 “construction, with the builder’s contract to construct the  
 “building according to the plans. The plaintiff’s contract  
 “bound him to furnish plans, specifications and drawings, and  
 “to superintend the construction of the building; not to put

*Shipman vs.  
 State  
 43 W1 361.*

*Architect  
 not to be Con-  
 founded with  
 Builder.*

*Shipman vs.*  
State,  
43 Wis. 381.

"or procure to be put anything into the building. That was  
"for the builder's contract. The pleading goes on to aver  
"several defects in the building so constructed, without con-  
"necting the plaintiff in any way with them; without any  
"statement whether the fault was in the plaintiff's plans or in  
"his superintendence; was in either or both. Such pleading  
"is so loose as to give countenance to a suggestion of the  
"plaintiff's counsel, that their substance is rather the work of  
"some querulous layman than an orderly statement of perti-  
"nent facts by a skilled pleader like the learned Attorney-  
"General. It is very certain that the (3d and 4th) answers  
"properly plead no defense or counterclaim. And it is not  
"irrelevant to express the hope that the court may not again  
"have to travel through such a barren waste of words."

The motion to amend was overruled.

Mr. William F. Vilas, afterwards Postmaster-General of the United States, was counsel for the plaintiff in this case. The opinion of the Court was delivered by Chief Justice Ryan.

Two more  
New York  
Cases.

Besides the last two cases, two more may be given, both from New York, which will illustrate what seems to be the difference in the way of looking at such matters in the same State, between an inferior court some fifteen years ago, and the highest court in the State ten years later.

*Gilman vs.*  
Stevens,  
54 N. Y. P. R.,  
197.

In 1877, the well-known architect, Arthur Gilman, sued Mrs. Marietta R. Stevens for a balance of \$832 due for professional services in completing and building an addition to an apartment-house on the corner of Fifth Avenue and Twenty-seventh Street, New York, and also for a commission of 2½ per cent on the estimated cost, "according to the schedule of the Institute of Architects," for making preliminary studies, general drawings and specifications for a proposed building on Thirty-seventh Street, which was not carried out. The estimated cost of this building was \$425,000, and the commission claimed amounted to \$10,625. In regard to this charge, Mrs. Stevens claimed that the plans were merely an adaptation of some made for another person, and

that the service was volunteered, Mr. Gilman having told her that the plans "should cost her nothing," and she set up a counter-claim against Mr. Gilman for \$20,000 for negligence in his work on the Twenty-seventh Street house, alleging that, "in consequence of negligence and want of skill and attention on the part of the plaintiff, the said building was not constructed in a strong and substantial manner. . . . The materials used in and about the construction of the same were not of the best character, and the work and labor upon the same were not faithfully performed, and that, in consequence thereof, the said building is less in value by the sum of \$20,000 and upwards than it should be if the plaintiff had performed his agreement and discharged his duty in the premises."

*Gilman vs.  
Stevens,  
54 N. Y. P. R.,  
197.*

The defendant's son-in-law testified that "certain arches over the store-windows in the first floor were weak, so that he saw the bricks bulging out over them," and two builders testified in her behalf that, in their opinion, the material used was not of the best quality, and the work was inferior, and that the value of the building was very much less on account of these facts. On the part of the plaintiff, five builders testified to having made offers to put the building in good condition for sums ranging from \$1,000 to \$2,000, and that the need of repairs was largely due to the fact that the building was erected in winter, and without the heat which the defendant had agreed to furnish, and that such repairs were usually required.

It seems to have been also shown by the evidence that the builder, Jones, was introduced or recommended to Mrs. Stevens by Mr. Gilman, and that he was intemperate, and otherwise misconducted himself; and Gilman admitted that, before the Twenty-seventh Street house was completed, and while the Thirty-seventh Street house was in contemplation, he received certain sums of money from Jones, as "advances and loans, to enable him to employ a staff of draughtsmen on the Thirty-seventh Street plans." Payment was to be made for the building of the Twenty-seventh Street house on fifteen



*Gilman vs.  
Stevens,  
54 N. Y. P. R.,  
197.*

certificates. Fourteen of these were shown; the fifteenth was not produced, although it appears to have been given, and Mrs. Stevens claimed to have paid the contract price in full.

As to Mrs. Stevens not having asked for the plans for Thirty-seventh Street, Mr. Gilman produced letters from her, asking him to "hasten those plans," and suggesting that Jones should "excavate under" a florist who occupied the lot, and "tumble him in" if he did not get out of the way. The contract with Jones for the Twenty-seventh Street building stated that "the work was to be done in a good, substantial and workmanlike manner, to the satisfaction and under the direction of the architect, Gilman, to be testified by a writing or certificate under his seal."

The judge made a rather cloudy charge to the jury, in which he at first adopted fully the popular interpretation of such a clause, saying: "Now, gentlemen, by the contract "under which this building was erected, the contractor, Mr. Jones, undertook to complete the work on or before the first "of January, 1874, and the contract, which is in writing, states "that the work was to be done in a good, workmanlike and "substantial manner, to the satisfaction and under the direction "of the plaintiff, the architect, to be testified by a writing or "certificate under his seal. These are significant words, "gentlemen, and, doubtless, you will not lose sight of them. "The duty of the plaintiff, therefore, it is quite clear, was to "see to it that the building was erected, having reference, "now, gentlemen, to those terms that I have suggested to you "as being significant. The work had to be done in accordance "with the plans, elevations, sections and specifications furnished by the plaintiff, and to his satisfaction, and the payment to the contractor for the work as it progressed, which "was to be paid in fifteen instalments, was dependent, in each "instance, upon a certificate in writing, to be obtained from "the plaintiff, that the contractor was entitled to the specific "payments. Of course, the giving of those certificates contemplated that the contractor had done the work in conformity

"with the plans and specifications, and to the satisfaction of the plaintiff." The judge then mentioned the claims of defects, and said: "But, gentlemen, you will determine, under the evidence, what the facts are in these regards, and, if the work and materials were defective, then whether such defects are in consequence of or owing to the negligence of the plaintiff in any regard. In determining this, you will doubtless consider, and it would be your duty to consider, the obligations and the duty the plaintiff assumed, and the manner in which he has met those obligations and discharged the duty, and whether the defects are of such a character as, by the exercise of the ordinary skill and attention of a person of his profession and in his relation, they could have been guarded against and prevented."

*Gilman vs.  
Stevens,  
54 N. Y. P. R.,  
197.*

It will be observed that the two portions of the judge's charge on this point would hardly be understood in the same way by an ordinary jury. In the earlier portion, he said, like Judge Leonard in his dissenting opinion in the case of *Petersen vs. Rawson*, that the "obligation" of the architect was to "see to it" that the work was done "in a good, workmanlike and substantial manner." Most persons would interpret this to mean that the architect warranted the contractor's work, but the judge said farther on that the architect was to "see to it" that the contractor did his work properly, only so far as "the exercise of ordinary skill and attention" enabled him to do so. There is a very important difference between the two things. If the architect warrants that the builder has carried out his contract, as is the view of ordinary lawyers, he is jointly liable with the contractor for all the defects in the building, and the appearance of a defect at once entitles the owner to collect damages either from him or from the contractor, as he may prefer, the case being assimilated, in their minds, to that of damage caused by a gang of robbers, in which each robber separately is responsible, under the law, for the whole of the mischief done by the entire gang. On the other hand, if the architect is liable only for "the exercise of the

*What does  
"see to it"  
mean.*

Gilman vs.  
Stevens,  
54 N. Y. P. R.,  
197.

An Equerry  
as a Building  
Expert.

ordinary skill and attention of a person of his profession," it is for the owner, if his house is unsatisfactory, and he desires to get redress from the architect, to prove that his plans or specifications were defective, or that he did not visit the building at proper times, or that he overlooked defects which an architect of ordinary skill would not have overlooked; and not for the jury to infer these things from the mere fact that the defects existed. The judge himself charged, farther on in this very case, that "the burden of proof is upon the defendant to establish that the plaintiff did not exercise ordinary care, diligence and skill in the superintendence of the building;" yet the defendant did not, according to the report of the case, do anything of the kind. On the contrary, all she proved was that some bricks were "bulged." Her son-in-law, presumably Lord Alfred Paget, equerry to the Queen of England, was allowed to testify that this phenomenon was due to "the weakness of the arch" under them—a matter, obviously, not of fact, but of expert opinion, as to which an equerry's judgment would be about as valuable as that of one of his horses. The defendant's other testimony, that of two builders who thought that the materials and workmanship of the Twenty-seventh Street building were defective, and that the building was worth twenty thousand dollars less in consequence, did not particularize the defects, except that they thought the plastering and painting were poor, and appears to have been simply the usual running-down of other people's work indulged in by such witnesses; while Gilman's five men, who offered to put the building in good condition for less than \$2,000, presented the strongest possible testimony as to the true value of the defects. Moreover, it was testified, and not denied, so far as the report shows, that the defects were due to the fault of Mrs. Stevens, who failed to keep her promise to furnish the necessary heating, without which a winter-built structure, in the climate of New York, cannot possibly be as good as it would be if properly warmed.

But, even if the defects were not due in any way to Mrs.

Stevens's failure to keep her promise, the rest of the testimony, on both sides, simply showed the contractor's fault, not the architect's, and no attempt was made to prove that the architect's neglect or unskilfulness caused the imperfection of the plastering or painting, or the "bulging" of the brickwork; so that the judge himself charged the jury that "for any misfeasance of Jones in the matter of the contract, Jones himself, or Mrs. Jones, or her surety, alone is responsible." This would appear to dispose entirely of the painting and plastering claims against the architect, leaving the equerry's bulge the sole circumstance from which the jury could even infer any fault on the part of the architect, although even here they were forbidden by the judge to infer such fault without direct testimony of the connection of the architect with the alleged defect.

As to the payment of money by Jones to Gilman, which might naturally prejudice a jury against an architect, the judge told the jury that the fact of Gilman's having taken "loans" from Jones, unless fraud or collusion were charged, which was not the case, "was not to be considered as a question in the case." He charged also that "the mere fact that the plaintiff introduced or recommended Jones to the defendant, or recommended the defendant to employ Jones, does not make the plaintiff responsible in this action for the intemperance or other misconduct of Jones."

In regard to the fees for the drawings and specifications for the unexecuted Thirty-seventh Street building, the court charged thus:

"I charge you that the fees, if payable at all, are two and one-half per cent upon the contemplated cost of the building. There seems to be no controversy that those are the rates that architects are entitled to recover in cases of this character." The schedule of the American Institute of Architects was read in court, and the judge charged that Mrs. Stevens knew the standard and regular rates of architects' fees, because it appeared that she had been charged the same rates by Mr. Gilman on several previous occasions.

*Gilman vs.  
Stevens,  
54 N. Y. P. R.,  
197.*

**Builder  
alone Re-  
sponsible for  
his own Mis-  
feasance.**

**The A. I. A.  
Schedule in  
Court.**

*Gilman vs.  
Stevens,  
64 N. Y. P. R.,  
197.*

The jury awarded Mr. Gilman \$3,000; a very singular result from the instructions and the evidence. That the jury must have considered that something was due Mr. Gilman for his services on the Thirty-seventh Street plans is obvious from their having awarded him anything beyond his claim for balance due on the other building, amounting to only \$832. Yet the judge charged them that if anything was due on account of the Thirty-seventh Street plans it must be two and one-half per cent, or \$10,625. This, with the balance due on the Twenty-seventh Street building, would make a total claim of \$11,457, from which the jury deducted \$8,457, as what the architect ought to pay for making good defects which five men offered to make good for less than \$2,000, which the judge charged that the contractor or his surety were alone responsible for, and the only evidence of which consisted in the loose assertions of a couple of builders, which they were not even called upon to justify or explain, and the opinion of an equerry upon the weakness of an arch. It is surprising that such evidence as that produced in Mrs. Stevens's behalf should have been admitted at all, but, even with that evidence, it is impossible to see how the jury, under the instructions given them by the judge, could have found for Mr. Gilman in less than nearly or quite the whole amount claimed. The explanation probably is that his case was badly managed, as architects' cases often appear to be, and that the jury, who, although forbidden to take that point into consideration, were probably unfavorably impressed by Mr. Gilman's pecuniary relations with the contractor, simply threw aside all the evidence, and the law, as explained in the judge's charge, with it, and pitched on three thousand dollars, by pure inspiration, as about what Mr. Gilman ought to have.

*Hubert vs.  
Aitken,  
15 Daly, 237.*

Twelve years later, in 1889, a decision in a somewhat similar case was rendered in the New York Court of Common Pleas. Here, as in the previous case, the architect's side of the controversy appears to have been very imperfectly presented, but the law was stated by the court upon the evidence as it stood,

with a precision and clearness which mark a considerable advance in the understanding of the subject.

Hubert vs.  
Aitken,  
15 Daly, 237.

Messrs. Hubert, Pirsson & Co., were architects of a building called the Mt. Morris Apartment-house, in New York, for Mr. John W. Aitken. The total cost of construction was \$118,000. The action was to enforce a lien for the architects' services. The defendant set up a counter-claim for alleged negligence on the part of the plaintiffs, resulting in defects, omissions and mistakes of contractors and workmen.

The case was tried first before a referee, who found for the plaintiffs, for the full amount claimed, and an appeal was taken to the full court.

In announcing the decision of the court, Judge Van Hoesen said, "The learned referee, in answer to the request of the 'defendant, has found that the sectional area of the boiler-flues' [probably tubes] 'for the building was 404 square inches; that the sectional area of the chimney-flue designed 'to receive the smoke and gases from the boiler-flues was, at 'its base, where it was entered by the boiler-flue, 272 square inches; that the area provided by the said chimney was inadequate for the service of the said boiler-flues; that by 'reason of the inadequacy of the said chimney-flue, the proper 'combustion of the coal in said boiler fires could not be secured; 'that to supply the deficiency of chimney-flue the defendant 'will necessarily and properly be required to build a new 'chimney-flue on the outside of said building; and that the 'necessary cost and expense thereof will be \$1,000. But the 'learned referee was of opinion that the plaintiffs were not 'liable to the defendant for the expense of supplying the deficiencies of the chimney, because, though architects by profession, they are not experts in steam-heating, and, to use 'the referee's language, 'all that was required of them was 'that they should confer with whoever became the contractor 'for the steam-heating, and ascertain what dimensions were 'required for the chimney-flue, to afford a draught for the 'heating system. This they did, and Tudor, the contractor

The Size of  
Boiler-flues.

Hubert vs.  
Aitken,  
15 Daly, 237.

“‘for the steam-heating appliances, gave the dimensions.  
“‘While it is obvious that this chimney was insufficient, the  
“‘responsibility should rest upon the person who committed  
“‘the fault.’

“I am unable to agree with the referee in his conclusion.  
“The plaintiffs are architects of standing, who assume to be  
“able to plan and superintend the construction of first-class  
“apartment-houses, to be heated by steam, and to be provided  
“with every convenience demanded by the luxurious tastes of  
“the day. They are not architects in a rural community, but  
“in the first city in America. Steam-heating is, as we all  
“know, common, if not a necessity, in all apartment-houses of  
“large size, and of a high class. It is true that houses of this  
“description are of recent introduction, but they are now a  
“very important part of our system of economics, for in some  
“of the new streets they are more numerous than private resi-  
“dences, or tenements of the kind that formerly was in vogue.  
“The architect who undertakes to construct a house that is to  
“be heated by steam is groping in the dark unless he knows  
“how large a chimney is required. It is as necessary that the  
“architect should know what is needed to make the steam-  
“heating apparatus serviceable as it is that he should know  
“how sewer-gas is to be kept out of the house.

“No one would contend that at this day an architect could  
“shelter himself behind the plumber, and excuse his ignorance  
“of the ordinary appliances of sanitary ventilation by saying  
“that he was not an expert in the trade of plumbing. He is  
“an expert in carpentry, in cements, in mortar, in the strength  
“of materials, in the art of constructing the walls, the floors,  
“the staircases, the roofs; and is in duty bound to possess  
“reasonable skill and knowledge in all these things; and when,  
“in the progress of civilization, new conveniences are intro-  
“duced into our houses, and become, not curious novelties, but  
“the customary means of securing the comfort of the unpre-  
“tentious citizen, why should not the architect be expected to  
“possess the technical learning respecting them that is exacted

"of him with respect to other and older branches of his professional studies? It is not asking too much of the man who assumes that he is competent to build a house at a cost of more than one hundred thousand dollars, and to arrange that it shall be heated by steam, to insist that he shall know how to proportion his chimney to the boiler. It is not enough for him to say, 'I asked the steam-fitter,' and then throw the responsibility of any error that may be made upon the employer who engages him, relying upon his skill. Responsibility cannot be shifted in that way. . . .

Hubert vs.  
Aitken,  
15 Daly, 237.

"I am of opinion that the defendant should be allowed to deduct from the plaintiff's demand against him the cost of correcting the defects in the chimney — \$1,000.

"I have read the appeal book through with care, but find nothing that warrants us in allowing a further deduction from the judgment."

The case was subsequently reargued. In announcing the decision, which confirmed the former one, the Chief Justice, Larremore, said, "The point upon which chief stress was laid in the re-argument of this appeal was that of the entirety of the contract between the parties. The plaintiffs are architects, who agreed to draw the plans for, and also, according to the custom of the profession, supervise the construction of the building referred to in the complaint. It appears that there was one grave fault in said plans, and that there were some quite serious departures from the specifications and from the best workmanship in the erection of said building. The learned counsel for the appellant therefore argues that the architect has not completely performed his contract, and that as said contract was an entire one for professional skill and services, and not a divisible or apportionable one, no recovery can be had, and the complaint should have been dismissed. But a very simple analysis will show that this construction is founded on a misconception. With regard to the plans, it appears that the contract was completely performed. Drawings for the whole building were furnished,



Hubert vs.  
Aitken,  
15 Daly, 237.

**Architect  
not Insurer  
of Perfection  
of Work.**

“and it was actually constructed in accordance therewith. “After the building was finished, it was discovered that the “chimney-flues, connecting with the boiler-flues, were not large “enough for the purpose for which they were designed. These “flues were not omitted from the plans; on the contrary, they “were set down with the same fulness of detail as the other “parts of the building. It cannot therefore be said that the “plaintiffs did not entirely perform their contract in this “respect; they completely performed it, but they performed it “negligently.

“Similar considerations apply to the other branch of the “case. The learned counsel would not claim that an architect “is bound to spend all his time at a building which is going up “under his professional care, so that no fraud or negligence “can be committed by any of the contractors. The counsel “would not contend that the architect is an insurer of the per- “fection of the mason-work, the carpenter-work, the plumbing, “etc. He is bound only to exercise reasonable care, and to “use reasonable powers of observation and detection in the “supervision of the structure. When, therefore, it appears “that the architect has made frequent visits to the building, “and in a general way has performed the duties called for by “the custom of his profession, the mere fact, for instance, that “inferior brick have been used in places, does not establish, as “matter of law, that he has not entirely performed his contract. “He might have directed, at one of his visits, that portions of “the plumbing work be packed in wool; upon his next return “to the building the pipes in question might have been covered “with brickwork in the progress of the building; if he had “inquired whether the wool packing had been attended to, and “had received an affirmative answer from the plumber and the “bricklayer, I am of opinion that his duty as an architect, in “the matter of the required protection of said pipes from the “weather, would have been ended. Yet, under these very “circumstances, the packing might have been intentionally or “carelessly omitted, in fraud upon the architect and owner,

"and could it still be claimed that the architect had not fully performed his work? The learned counsel for the appellants is, in effect, asking us to hold that the defects, of the character above-named, establish, as a matter of law, that the plaintiffs have not fully performed their agreement. An architect is no more a mere overseer, or foreman, or watchman, than he is a guarantor of a flawless building; and the only question that can arise in a case where general performance of duty is shown, is whether, considering all the circumstances and peculiar facts involved, he has or has not been guilty of negligence. This is a question of fact, and not of law.

Hubert vs.  
Aitken,  
15 Daly, 237.

Architect  
not a mere  
Watchman.

Negligence  
of Architect  
a Question of  
Fact, not of  
Law.

"Upon reconsideration, I am more firmly convinced of the correctness of our conclusions reached after the former argument. The defect in the plans which led to the construction of too small a chimney was something for which the plaintiffs, and no one else, could be held responsible. For the reasons so cogently stated in Judge Van Hoesen's opinion, the plaintiffs were, as a matter of law, guilty of negligence in falling into this grave error. In analogy with the rule adopted in ordinary contractors' cases, we deducted from the sum due under the contract the amount of damages caused by such negligence, and directed that the plaintiffs either take judgment for the balance, or suffer an absolute reversal. As to the conceded facts of malconstruction and use of inferior materials, the referee has decided, on sufficient evidence, that the same were not properly attributable to the plaintiff's negligence, and we can discover no reason for disturbing his findings.

"The order entered after the former argument must in all respects stand."

In this very recent and important case, the duties of the architect, and the distinction between them and those of the contractor, are laid down with great clearness and precision, and, on the facts as presented, even architects will probably acknowledge that strict justice was done; but, so far as

*Hubert vs.  
Aitken,  
15 Daly, 237.*

**The Rule  
for Proportioning  
Boiler-flues.**

the report indicates, the facts were presented with a singular carelessness of the interest of the plaintiff. The referee's finding, based, of course, on the evidence offered him by both sides, made it appear that the scientific rule for proportioning boiler-chimneys, which the architects ought to have followed, was to make this area of the chimney-flue equal to the combined area of the boiler-tubes, and, as it was easily proved that the area of the flue was less than that of the tubes, he assumed, and the judges, of course, followed his conclusion, that the architects had neglected to comply with a scientific rule which they ought to have known and followed. Now, in point of fact, there is no such rule. It is not uncommon for ordinary mechanics, of the sort that the judge contemptuously called "steam-fitters," to use such a proportion, which is easy of application, and gives a flue which, if too large, can be reduced by partly closing the damper; but this practice has no scientific basis whatever. On the contrary, the rules given in the books usually concern themselves only with the ratio between the smoke-flue and the grate-surface, without any regard to the area of the boiler-tubes. It is obvious that the amount of coal consumed, and the volume of smoke to be carried off by the chimney, are strictly limited by the grate-surface, and the proper capacity of the chimney is that which, taking into account the proportion of openings to solids in the grate, and the resistance offered to the passage of air by the coal, as well as the height of the chimney, and the estimated velocity of the flow through it, will carry off the products of combustion freely.

In many cases, probably, there is an excess of tube-area in the boiler over that required by the grate-surface, so that most of the smoke passes through a portion of the tubes; but the chimney can evidently draw only so much air as the grate-surface supplies, whatever the tube-area may be. What the grate-surface in this case may have been, no one seems to have inquired, and, although it does not follow that the chimney was really large enough for its purpose, or that the architects may not have been at fault in some other way, the record

represents them as having been fined a thousand dollars for having neglected to observe an imaginary rule, which is unknown to science, and has no foundation in reason or authority.

Moreover, the court reproached the architects for having deferred to the judgment of "the steam-fitter" in designing their flue, instead of following the guidance of their own "technical learning." So far as the facts were presented to the court, this point was well taken; but it does not seem to have been anywhere suggested, in behalf of the architects, that Mr. Tudor, far from being a mere "steam-fitter," was one of the most accomplished experts in steam-heating in the United States. If the architects had felt any doubt about the proportioning of their chimneys, or in regard to any other point in the heating of their building, it would have been their duty, in their client's interest, to consult exactly such an expert as Mr. Tudor, and to follow his advice, in preference to their own opinion, and they might justly have been accused of negligence if they had failed to do so; while Mr. Tudor's position, as the contractor for the heating-apparatus, gave his opinion the additional weight to be derived from special familiarity with the problem, and a personal interest in the successful working of the apparatus.

It seems hardly possible to doubt that these considerations would have had a very important influence in modifying the decision of the court, if they had been brought to the attention of the referee, and, through him, to that of the judges, but there is no indication in the report that they were presented at all. On the contrary, the referee thought, although the court did not agree with him, that it was the duty of the architects to "confer with whoever became the contractor for the steam-heating," and that if they did this, their duty was fulfilled, no reference whatever being made to Mr. Tudor's exceptional position as an expert of the highest rank.

Another point which seems to have been neglected by the counsel for the architects was the proof of the necessary cost of

Hubert vs.  
Aitken,  
15 Daly, 237.

The Pen-  
alty for not  
Observing a  
Rule which  
does not Ex-  
ist.

Hubert vs.  
Aitken,  
15 Daly, 237.

**The Measure of Damages for Negligence.**

remedying the deficiency in the size of the chimney, if it really existed. Every architect knows that the insufficiency of a flue, in cases where heating-systems are changed, is often remedied by connecting another spare flue, perhaps a ventilating-flue, or one intended for stoves, with the boiler, so as to give the boiler two flues instead of one. This arrangement works perfectly well in most cases, and costs only a few dollars; and the architects, even if their negligence were proved, could only be held liable for the cost of the cheapest reasonable method of remedying the defect due to their fault; but no attempt appears to have been made, on behalf of the architects, to devise such a method, and the defendant's estimate of the probable expense of remedying the alleged trouble appears to have been accepted without question.

The whole story shows how extremely technical cases concerning architects usually are, and how difficult it is to have their side properly placed before a court, even in a community so familiar with professional work as New York. In other places, where architects are little employed, the temptation to confuse their functions and responsibility with those of the builder is still strong.

**The Law in Iowa.**

Schreiner vs.  
Miller,  
67 Iowa, 91.

In a case in Iowa, an architect was employed to furnish plans, and superintend the erection of a house. After the house was done, the architect brought suit for the amount of his bill, and it then appeared that one of the walls had cracked badly. The architect attributed the cracking to a defect in the foundation at that point. The court said, "the plaintiff, under his employment, was bound to furnish proper plans, and to see that the house was at least reasonably well constructed. . . . A house is not constructed with reasonable care, the foundations of which are so defective as to cause the walls to crack"; and the architect was held liable on the counter-claim for damages, and recovered nothing.

Here the Supreme Court says nothing about the responsibility of the contractor who built the walls, or about the necessity for proving negligence on the part of the architect;

this, it thinks, is the legal inference from the existence of the defect; and the decision must be considered as establishing the law in Iowa, at least for the present.

In New Jersey, a very singular conclusion has been arrived at, in a case decided some years ago. The verdict of the jury in the court below established that a house had been badly built in consequence of the joint neglect of the architect and the contractor. The Supreme Court held that a suit, founded on such neglect, would lie against the architect alone, on the ground that "where two or more persons cause damage by "contributory misfeasance, each is responsible for the entire "detriment," just as in the case of a gang of robbers, as mentioned above. In this case, the owner had retained a portion of the contract price, on the ground of the imperfection of work and materials, and the architect's counsel claimed that, as a man cannot get damages from two persons for the same injury, this should be offset against the claim made against the architect. The court held that if the contractor had sued for the contract price, and the defence had been interposed that it was not due on account of the imperfection of the work, and this defence had prevailed, the action against the architect would have been barred; as, if a person recovers indemnification from one wrong-doer, he cannot pursue the other wrong-doer for the same cause of action; but, in this case, the contractor had not consented to the retention of the money (which would also be held as a satisfaction of the claim), and might at any time bring suit for it, and the owner might be forced to pay it; so that, under the circumstances, it could not be regarded as an absolute satisfaction of the damages embraced in the verdict. "It is true that in this way the burden of sustaining the loss is shifted on to the defendant, as the architect, from the contractor, who will thus be enabled, so far as the present damages are concerned, to recover the money in question. But it is to be borne in mind, and the circumstance is an additional reason why the money retained cannot be considered as a satisfaction of this cause of action, that the money

*Schreiner vs.  
Miller.  
67 Iowa, 91.*

*Newman vs.  
Fowler.  
8 Vr., 89.*

**Compensation cannot be Recovered from Two Persons for the same Injury.**

*Newman vs.  
Fowler,  
8 Vr., 51.*

"in question may be kept back by the plaintiff on the foot of  
"other damages than those embraced in this suit. For it is  
"not a necessary consequence that the defendant is responsible  
"for every part of the neglects or misconducts of the contrac-  
"tor in the doing of the work in question. There was a same-  
"ness of responsibility only when the negligence of the  
"contractor was such as to be discoverable by the exercise of  
"reasonable care and skill on the part of the architect; for the  
"effects of negligence beyond this measure, the contractor alone  
"would be answerable."

The curious part of this decision is to be found in the reason given by the court for permitting the owner to recover the whole amount of his damages from the architect, at the same time that he retained similar indemnity out of money due the contractor. The court said that the reason why the money that the owner had kept back out of what he owed the contractor was not to be regarded "as an absolute satisfaction of the damages embraced in the verdict" was that the contractor "might at any time bring suit for it, and the owner might be forced to pay it." On the theory of the court, that the architect and contractor were each responsible for the whole damage, the owner could not be "forced to pay" the money unless it was proved that he had not been damaged; and if he had not been damaged, the architect would owe him nothing; so that this system makes the architect guarantee the guilt of the contractor, besides paying the penalty. It is as if a man should come into court with an allegation that he had been attacked by two robbers, who had got from him five hundred dollars. He had got his five hundred dollars back, by picking the pocket of one of the robbers, but wanted the court to get five hundred more for him out of the other robber. On the principle here expounded, the court would proceed to do so, on the ground that it might turn out that he had never been robbed at all, so that he would have to give back what he had taken from the first man's pocket.

Apart from this, the theory of "contributory misfeasance"

between the architect and contractor, to account for defects in the work, although convenient for juries who do not like to take the trouble to inquire into the technicalities of building, is less satisfactory in application than the New York and Wisconsin principle, that architects and contractors have each their own peculiar duties, and are responsible only for proved neglect of those duties. Evidently, an architect who knows that the owner, if the contractor succeeds in doing anything wrong, is at liberty to accept the imperfect work, pay the contractor in full, and extort the damage from him, is under the strongest possible temptation to conceal the builder's bad work or materials, instead of appealing to the owner's authority to compel him to fulfil his agreement; and contractors are quite aware of the power which the theory gives them over the architects under whose direction they work.

**The Objection to the Theory of Contributory Misfeasance.**

The French law, although nominally very oppressive toward architects, has really come to coincide closely with the modern New York and Wisconsin jurisprudence.

**The French Law of Architects' Responsibility.**

The Code Civil, Article 1792, says, "If the edifice constructed at a fixed price perishes, totally or in part, through vices of construction, even by the vice of the soil on which it is built, the architect and the contractor are responsible for it during ten years."

This would seem to make the architect the guarantor of the perfection of the contractor's work, as many people here would like to make him out to be; but the French courts interpret the law very differently. It is well known, both from the evidence of contemporary writers on architecture and building, and from the history of the discussion which preceded the adoption of this clause in the Code, that in the early part of the present century, and for many years before, the architect was commonly the principal contractor for the building. At that time, the trade guilds still flourished, and one of the rules of the guilds was that no member of any guild should contract for or do work belonging to any other guild; so that the only way to include a whole building in one contract was to make an agreement

**The Position of Architects in the Napoleonic Period.**



with some one outside the trades, and let him make sub-contracts for the different portions of the work. The person with whom the principal contract was usually made would naturally be the architect, and as, like any other contractor, he would be tempted to save money for himself by surreptitious means, to the detriment of the strength of the building, the law made him and his sub-contractors responsible for a fixed term for the solidity of the structure. Even at that time, however, there were certain architects, particularly those employed by the Government, who held aloof from contracting, and prided themselves on their strictly advisory, or, as we should say, professional character; and this attitude of architects toward their clients came by degrees to be the recognized and usual one. Still, the language of the Code remained unchanged, and grew constantly less applicable to the changing relation of architects to their clients, until, in 1844, after a contest carried on for several years, the highest court in France defined the legal responsibility of architects of the modern sort to their clients for imperfections in the work under their charge.

Ville de S. Germain-en-Laye,  
vs.  
Malpièce et  
Moutier.  
Cass. 12 nov.  
1844.  
Daloz, 1845, 1-8.

A church was built at Saint Germain-en-Laye, from the plans and specifications, and under the superintendence of two architects, Malpièce and Moutier. Curiously enough, a clause in the contract with the carpenter, which was drawn up by the architects, said that "The architects and contractors will be responsible for ten years for the work executed in the construction of the said church, conformably to Article 1792 of the Code Civil," this being perhaps at that time a common formula in such contracts. The specification called for roof-timbers of oak, cut two years, and well seasoned. Actually, the timbers, when put in, appear to have been green, and, after the roof was up, all the timbers were brushed over with tar. Soon after this, some of the trusses failed, and pushed out the walls, and it was found that nine out of the twenty tie-beams were rotten. The church authorities brought suit against the carpenter and the architect jointly, to recover \$2,800, the cost of repairing the damage caused by the failure of the roof. The inferior

Rotting of  
Roof-timb-  
ers.

court held that the carpenter was solely responsible; and the church authorities appealed, claiming damages from the architect also, both under his alleged joint liability with the contractor, under Article 1792 of the Code, and on the general ground that "The architect, moreover, ought to know the quality of the materials employed; in accepting the mission of directing the works, he assumes the responsibility of their good execution." It will be observed that this is just the position so popular here at present, but it failed to secure the support of the Court of Cassation, which confirmed the decision of the court below. The evidence was conflicting as to whether the architect could have discovered the greenness or bad quality of the timber before it was put into the building; and the clause in the contract above quoted might reasonably have been interpreted as a voluntary assumption of a responsibility which the statute might not throw upon him; but the court said that "The responsibility pronounced against architects by Article 1792 of the Code Civil does not apply except in cases where the edifices have been constructed by them for a fixed price. And especially, when the cause of the disorders of an edifice has been recognized as proceeding from hidden vice of material, the architect who did not undertake to build it at a fixed price, but who limited himself to preparing the plans, writing the specifications, and directing the work, should not be held to the responsibility of Article 1792, when it is otherwise established that the plans are conformable to the rules of art, that the direction of the work has been conscientiously pursued, and that the verification of the materials has been well done. In such a case, the responsibility falls upon the contractor who has furnished materials infected with an internal vice." As to the claim made by the appellants, that the original decision of the lower court violated Article 1792 of the Code, the Court of Cassation repeated, later, that "Inasmuch as this article, which renders architects responsible during ten years for the edifice which they have constructed (*font construire*), applies only to edifices constructed for a fixed price, it follows

Ville de S. Germain-en-Laye,  
*vs.*  
 Malpèce et  
 Montier.  
 Cass. 12 nov.  
 1844.  
 Dalloz, 1845, 1-3.

Ville de S. Ger-  
main-en-Laye,  
vs.  
Malpièce et  
Moutier.  
Cass. 12 nov.  
1844.  
Daloz, 1845, 1-8.

"from this that where edifices have not been constructed by  
"architects for a fixed price the article is inapplicable.

"Inasmuch as, in fact, in the present instance the Sieurs  
"Malpièce and Moutier have not constructed for a fixed price,  
"(*à prix fait*), the church of Saint Germain, but, on the con-  
"trary, it has been constructed by contractors, of whom the  
"judgment of the court below recognizes the responsibility, and  
"whom it has condemned in consequence, it follows that the  
"judgment, instead of violating Article 1792 of the Code Civil,  
"makes, on the contrary, a correct application of it."

Cass. 15 juin,  
1863.

In 1863, the Court of Cassation made a further modification  
of the law. In the case of the church of Saint Germain, it  
held that the architect, to free himself from responsibility for  
defects in his buildings, must establish "that the plans are con-  
"formable to the rules of art, that the direction of the work  
"has been conscientiously pursued, and that the verification of  
"the materials has been well done." In the latter case, the  
court decided that the burden of proof should not be upon the  
architect, but upon his accuser, saying, "If an architect limits  
"himself to directing the execution of plans which he has pre-  
"pared, it is Article 2270 of the Code which is applicable, and  
"the responsibility of the architect is not engaged except so far  
"as fault is proved against him, according to Articles 1382 and  
"1383."

The articles referred to read as follows :

Art. 1382. "Any act whatever, which causes damage to  
another, obliges him by whose fault the damage occurred to  
repair it."

Art. 1383. "Every one is responsible for the damage which  
he has caused, not only by his act, but also by his negligence  
or imprudence."

Art. 2270 simply limits the responsibility of architect and  
contractor to ten years.

All the more recent French cases have been decided in  
accordance with these principles. Article 1792 of the Code is  
universally held not to apply to architects unless they are also

contractors; and the responsibility of an architect under ordinary circumstances is governed by the Articles 1382 and 1383, which apply equally to all other persons; while, as by the more recent decisions in our courts, the negligence or incompetency for which it is desired to hold him responsible must be proved against him by proper evidence, and not left to presumption or inference.

Cass. 15 juin,  
1863.

The French courts, however, in applying these principles, make certain distinctions which are unknown here, but which seem to be valuable. It often happens that a building turns out to be badly built, or unsatisfactory in some other way, partly through the fault of the builder, and partly through that of the architect. If, as is often the case, there is no way of distinguishing accurately between the damage due to the architect's fault, and that for which the builder should alone be responsible, the court takes it upon itself to apportion between them the damages to be paid to the owner.

**Special  
French Dis-  
tinctions.**

A couple of cases, out of many to be found in the reports, will serve to illustrate this point.

In 1873, a party-wall was underpinned by a contractor, under the direction of an architect. The wall was not shored, and the new work built underneath it was not of the proper thickness. The wall fell, injuring the adjoining house, and the owner of the injured building sued both the architect and contractor for damages. It was claimed, on behalf of the architect, that he could not be held responsible for work done by the contractor; but the court held that the architect might be held responsible for damage occurring through the act of the contractor, if proper supervision on his part would have prevented it. In this case, the court found that the damage was caused by bad workmanship on the part of the contractor, and deficient supervision on the part of the architect, and condemned them to pay the loss together; the contractor to contribute two-thirds, and the architect one-third, of the sum required.

Costansin vs.  
Duperehe et  
Chauvet,  
Req.  
25 mars. 1874;  
Dallos,  
1874, 1, 285.

The court expressly said that the architect and contractor were not held responsible under Article 1792 of the Code, but

"Solidarity" of Responsibility between Architect and Contractor.

under Articles 1382 and 1383; and that as the cause of the damage was a single circumstance, the result of the joint fault of the contractor and the architect, there was reason for pronouncing "solidarity" between them.

Dalloz, the editor of the *Jurisprudence Générale*, in commenting on this case, says, "The architect is not legally responsible '*solidairement*' with the contractor for damages resulting from the bad work of the contractor; but it is otherwise if a fault, such as defective supervision, is proved against him. In this case, the principle applies that damage caused by the concurrence of several faults, not accompanied by intention to injure, ought, since the result is indivisible, to be '*solidairement*' repaired by its authors, even though neither concert nor community of interest existed between them."

Fleury-Boisson  
vs.  
Jugnet et  
Sénétaire,  
C. de Lyon,  
26 mai, 1883;  
Dalloz,  
1884, 2, 132.

In another case, Boisson was architect of a house, and Sénétaire was the builder. The plans were defective, and the materials very bad. The building cracked and settled, and the owner sued the architect and builder for damages. The court found that the defects were due in part to imperfect plans, and lack of precise directions, on the part of Boisson, but more to Sénétaire's bad materials and workmanship. It considered that as Boisson was shown to have visited the building "at least once a week," "these frequent visits rendered supervision easy," and he ought, with his science and experience, to have observed the bad quality of the mortar, as well as the settling of the walls. It held, as in the case just quoted, that the architect and builder were liable *in solidum* for the damage, but that there was reason to divide the responsibility between them, in the proportion of one-tenth for the architect and nine-tenths for the builder.

In this last case there was a further complication, as the builder had gone into bankruptcy shortly before the trial of the suit, and it seems to be the rule that when damages are apportioned in this way, if either party is actually unable to pay his share, the other must make it good. The obvious moral of this is that architects in France ought to be very careful

not to have anything to do with any but the most solvent contractors; but the question of requiring either the architect or the contractor to act as indorser for the just liabilities of the other belongs to a branch of law which need not here be considered.

**Fleury-Boisson  
vs.  
Juguet et  
Sénétaire,  
C. de Lyon,  
26 mai, 1883;  
Dalloz,  
1884, 2, 132.**

### CHAPTER III.

#### THE ARCHITECT'S POSITION WHEN THE COST EXCEEDS THE LIMIT.

**Architect to  
Carry out  
Employer's  
Wishes under  
Certain Re-  
strictions.**

**Architect is  
Bound to  
Know the  
Local Build-  
ing Regula-  
tions.**

**Exigencies  
of Good Con-  
struction  
Paramount.**

**B**ESIDES serving his employer with skill and care, the architect is bound to carry out his wishes, so far as this can be done without violating the laws, ordinances, building regulations, inspector's directions, or other restrictions to which all citizens are subject, or the rules of sound construction. So far as the local regulations are matters of statute law, the architect is bound to know them, and would be liable to his employer for any damages which might be caused by his neglect or ignorance of them; but he is not bound to be familiar with the decisions of inspectors or referees in regard to points left indefinite by the statute. He should, however, use due diligence in seeing that any directions or decisions which may be given in regard to the work with which he is concerned are complied with, and if extra work is necessary for the purpose, and the owner is not at hand to give the necessary orders, the architect not only may, but should, give them, and the owner will be bound to pay for the work so ordered, while neglect of the architect to take the necessary steps, in case of such an emergency, will expose him to a claim on the part of the owner for damages if subsequent loss should be occasioned by such neglect. In the same way, the architect must not allow himself to be connected in any way with construction which he knows to be dangerous, or even doubtful, whatever may be the owner's wishes on the subject.

It is obvious that a physician who would consent to having

one of his patients take a dose of arsenic, instead of bromide of potassium, on the ground of its being cheaper, or who even failed to protest vigorously against such a course, would be fortunate if he escaped a trial for manslaughter; yet architects often acquiesce in very doubtful methods of construction, at the desire of owners, who frequently claim an extensive acquaintance with the art of building. For professional men, such weak compliance is very dangerous. If evil results should follow, the owner might pursue them for having misled him into thinking that such a construction was admissible, and a jury would be sure to agree with him; and it has even been decided in France that an architect is at fault who consents to a piece of doubtful construction at the positive order of the owner.

**Architect must not Consent to Doubtful Construction, even at Owner's Order.**

In general, the courts, as well as people outside the courts, consider it the paramount duty of an architect to build well and strongly. It should be his care to save his employer's money where he can, but not at the expense of the durability of the building which he constructs for him; and if unforeseen difficulties arise, he will find more favor in ordering them properly provided for, at a considerable extra expense to the owner, than in risking the loss of the money already invested, by hesitation in adopting what his superior knowledge tells him to be necessary measures.

It is very different with matters which do not relate to the construction of the building. Here, the wish of his employer is the only rule for the architect to follow, and no regard for the æsthetic welfare of the owner and his family will justify the architect in involving him in extra expense for decoration or ornament, unless, as is sometimes the case, the owner has given the architect special authority in such matters. In fact, juries are, in this country, generally quite insensible to æsthetic values, and the architect must be prepared to see the owner supported by the courts in mangling his design remorselessly, if there is anything to be gained in the way of money by doing so. In the same way, if there is any incompatibility between

**Owner's Wishes must be Followed in Æsthetic Matters.**



**Where Limit of Cost is Incompatible with Effect Desired, Limit of Cost Rules.**

the owner's idea of the style of house he wants, and the sum that he is willing to pay for it, his wish in the latter respect is always assumed to be paramount, and the architect who follows the first, and fails to comply with the other, is likely to get nothing for his pains.

From misunderstandings on this point arise nearly all the troubles which an architect encounters in his private business. Very many persons have an unreasonable fear of architects, derived, undoubtedly, from the stories which are repeated from mouth to mouth about the exploits of some of the reckless and irresponsible members of the profession, and give to the one whom they consult a limit of expense ridiculously inadequate to the accommodation which they desire, on the assumption that he will be sure to exceed it. In fact, it is not unusual to hear intelligent men say that they always limit an architect to half the amount that they really intend to spend. The consequence of this is that if the architect is conscientious, he takes his client at his word, and produces for him a cheap, unattractive plan, which he knows can be executed for something like the sum named, but which, of course, presents only a small part of the beauties and conveniences that the owner had pictured to himself.

**Conscientious Architects at a Disadvantage.**

If he is not conscientious, or if, as more commonly happens, he knows that his client really means to spend more than the sum he specifies, he guesses at the sort of building that is actually wanted, and makes his plans accordingly; and in most instances the owner is quite satisfied with the result.

There are, however, exceptional cases, where, on the one side, an irresponsible and reckless architect deludes an owner, by attractive plans and misleading estimates, into commencing an undertaking which is not completed until the man who pays the bills is half ruined; or where, on the other side, an unscrupulous owner takes advantage of an architect's having exceeded a limit of expenditure which was meant to be exceeded, to rob him of a part or all of the money justly due him.

The remedy for this unsatisfactory condition of affairs lies

partly with the owners and partly with the architects, each of whom should be more frank with the other. If an owner wishes to restrict his expenditure within a certain sum, as is usually the case, he should tell the architect so, mentioning also whether he wishes to have the given amount cover the architect's fees, the papering or other furnishing or decoration, the mosquito screens and outside windows, and, especially, the laying out and planting of the grounds about the building. Few persons who build for the first time in the country have any idea of the cost of fences, embankments, filling, smoothing, terraces, sodding, gravel-walks, under-drains, flower-beds, trees, vines, bedding-plants, and so on, which they will need before they are satisfied with the appearance of their place. One good authority lays down the rule that a sum at least equal to the cost of the house itself must be spent on the grounds to obtain an attractive result. This would be much too large an estimate for most suburban places, but, whatever is the amount to be devoted to such purposes, the architect should be informed whether the owner intends to include it in the limit of cost which he specifies. In most cases, the architect himself will be a tolerably good guide as to the cost of simple landscape-gardening, and if he and the owner can understand exactly what is wanted, and how much money is to be devoted to each portion of the undertaking, the result, if the architect is competent, and the owner not unreasonable, is almost sure to be satisfactory; for it is generally the case that the more skilful an architect is, the more he can accomplish in the way of convenience, beauty and healthfulness, with a given sum.

If the owner says nothing about fences, terraces, or grounds, the architect will generally suppose that the limit of cost given him is intended to cover only the bare cost of the building, commonly without screens, outside windows, or any grading or planting beyond the smoothing of the ground within six or eight feet of the building, and dumping the surplus gravel or clay from the excavations in some convenient part of the place,

**Necessity  
for Better  
Understand-  
ing Between  
Owners and  
Architects.**

**Expenses  
Supplement-  
ary to Build-  
ing.**

**What the  
Limit of Cost  
Ordinarily  
Covers.**

**Inevitable  
Uncertainty  
of Estimates.**

as this is all that it is usual to include in the builder's contract; and the owner should ask for the additional estimates if he wants them. In any case, however, it should be remembered that an architect's estimates cannot possibly be anything more than approximate, as he knows nothing of the combinations of local mechanics, or the approaching bankruptcy of some reckless builder, or of many other circumstances which will greatly affect the price for which a contract can actually be made. In general, his estimate, for work of a sort with which he is familiar, will be pretty near the sum which the building ought to cost, with a reasonable profit to the contractor; but there are many cases where contracts cannot be made on this basis, and the owner must pay what the people who have a monopoly of the business choose to demand, or go without his building; while there are other cases where the work can be contracted for at a price below its proper value, with a mechanic who cares for nothing but to get the job, appropriate all the payments to his own use, and then fail, leaving the journeymen, and the dealers in materials, to get their pay as best they can.

In consequence of these uncertainties, it is universally regarded as unreasonable to hold an architect responsible for strict compliance with the owner's wishes in regard to cost. It is always open to the owner, if the estimates of the contractors are too high, to moderate his wishes as to the convenience or beauty of the building, and the architect will generally make no charge for helping him to do so judiciously; but he has no right to dismiss the architect altogether upon this pretext, unless the lowest sum for which it proves to be possible to build the intended structure exceeds in a considerable degree the amount which was distinctly stated to the architect as the limit of expense to be incurred.

**What is  
Reasonable  
Compliance  
with Limit of  
Cost.**

Just where the line is to be drawn between a reasonable and unreasonable excess of the estimates, or of the actual cost, over the limit fixed, is not quite certain. It is sometimes set by agreement at 25 per cent, and this seems to meet with the

approval of ordinary people, but the arrangement should be made before the work is begun. After it is completed, and the builder has explained to the owner that all the delays and blunders that have occurred about the building have been entirely due to the fault of the architect, the latter will have more difficulty in reaching an amicable understanding with his employer.

May be Agreed Before-hand.

If he should fail to do so, and the aid of the courts should have to be called in, he will find them tolerably liberal in their ideas of the latitude which should be afforded him in such matters.

What Courts Think.

The most important case involving this point to be found in our records was decided in Texas.

Here an architect was, as he said, instructed to prepare plans for a hotel, to cost "about \$100,000." After the plans were made, the lowest estimate which could be obtained for carrying them into execution was \$102,475. The owner then abandoned the undertaking, and refused to pay the architect anything; and the architect brought suit for the compensation which had been promised him. The owner claimed that the limit which he gave the architect was \$75,000, instead of \$100,000; that, the lowest estimate having exceeded \$100,000, he was not bound to pay the architect anything, even on the architect's own version of the matter; and that the architect omitted to include his own commission of five per cent in the estimated cost, so that the lowest estimate should have been estimated at \$107,589.73. The court below instructed the jury that if the owner really directed the architect, as he alleged, to make plans for a building to cost \$75,000, and it turned out that it would cost more than \$100,000 to carry the plans which were made into execution, the architect could recover nothing for making them; but if the direction given was to make plans for a building to cost about \$100,000, the preparation of plans which would cost \$102,475 to execute was a sufficient compliance with the instruction.

Smith vs. Dickey, 74 Tex. 61.

As to the architect's fees, and the expense of superintending

**Architect's  
Fees not  
Properly a  
Part of Esti-  
mated Cost.**

the building, the court held that they were not properly to be regarded as a part of the estimated cost; but even if they were to be so regarded, the court considered that the total amount, of \$107,589.73, would still be "about \$100,000," and the agreement, as testified to by the architect, would have been complied with.

The owner's counsel appealed from these rulings, but they were sustained by the Supreme Court.

Here, therefore, the Supreme Court thought that if the lowest estimate had been one-third greater than the limit given the architect, the latter could have recovered nothing for his work; but an excess of about eight per cent, where the limit had been given only as "about \$100,000," would not be sufficient to deprive him of his right to his pay.

**Nelson vs.  
Spooner,  
2 F. & F. 613.**

In an English case, an architect made plans for a school-building for a board of trustees, who had only £1,350 in their hands to pay for it. After the plans were made, the architect estimated that it would cost £1,545 to carry them out; and he repeatedly assured the trustees that his buildings "never exceeded the contracts," unless changes were authorized by the owners themselves. After these plans, and his estimate, had been presented, he suggested some changes, which, he said, he thought could be included in the estimated price. The plans were then submitted to builders for bids, and the lowest bid received was £2,056.

**A Question  
for the Jury  
in England.**

The trustees then told the architect that they should do nothing further about carrying out his plans, and returned his drawings; and he sued them for his pay. There was contradictory evidence as to whether the original plans could have been executed for the sum estimated by the architect, and whether the discrepancy between this and the actual bid arose from the additions and changes made in them; and the question was submitted to the jury, whether the bids were reasonably near to the architect's estimate, so that the trustees ought to have employed him. The jury disagreed on this point, and were discharged, and the case appears to have been settled out of court.

Here, therefore, a jury seems to have found it doubtful whether a discrepancy of nearly one-third between the architect's estimate and the lowest actual bid was sufficient to deprive the architect of his right to payment for his work.

*Nelson vs.  
Spooner,  
2 F. & F. 613.*

Where the plans are selected by competition, it is very commonly the case that committees are deceived by estimates made by unskillful and irresponsible architects; and even the better class of architects, who feel that it is a mere chance whether they get the work, are apt to be much less careful in making their estimates than they would be in dealing directly with a confiding client; so that public competitions are often followed by financial griefs on the part both of architects and owners.

*Estimates  
in Competition.*

In 1884, the two celebrated architects, Bourdais and Davioud, were selected in competition as the architects of a combined theatre and hotel, to be erected by the municipality in the town of Cannes. The limit of cost was fixed by the terms of competition at 500,000 francs for the entire building, one-half this sum being allotted to each part. When the plans were ready for estimating, it was found that the cost of the hotel alone would be 417,000 francs. The municipality, nevertheless, began operations, and spent 70,000 francs in the preliminary work on the building, and then suddenly decided to abandon the construction of the theatre altogether, and, after dismissing Davioud and Bourdais, employed another architect to complete the building of the hotel. The programme of competition had reserved to the municipality the right to abandon the whole affair, paying the successful competitor 2,500 francs, or to pay  $2\frac{1}{2}$  per cent on the cost for plans and specifications alone. Bourdais brought suit for  $2\frac{1}{2}$  per cent on 417,000 francs, the estimated cost of the hotel, together with damages for wrongful discharge. The court decided that he was entitled only to his commission of  $2\frac{1}{2}$  per cent on 250,000 francs, the expenditure contemplated in the programme, and that he had no claim for damages for his discharge. If the town had done nothing about carrying the plan into execution, it would, under the conditions of the programme, have had to pay only the 2,500 francs

*Bourdais et  
Davioud vs.  
Cannes.  
Daloz, 1885,  
3-4.*

stipulated ; but, having begun operations, it could not claim to have abandoned the undertaking, so far as Bourdais was concerned.

**Ada St. M. E.  
Church vs.  
Garney,  
66 Ill. 132.**

**Conditional  
Acceptance  
of Plans.**

In another case, decided in Illinois, an architect submitted plans in competition for a church. They were accepted, on condition that they could be carried out for a certain sum. It was proved that they could not be carried out for that sum, and the church refused to pay the architect for his work. The architect brought suit, but he failed to show any promise to pay him for his plans, except the conditional one, and the court held that he was not entitled to recover anything.

## CHAPTER IV.

### THE RESPONSIBILITY OF THE ARCHITECT FOR HIS OWN WORK.

**W**E have seen that the present tendency is to separate the responsibility of the architect from that of the builder, making the former liable only for the consequences of what is shown to be lack of ordinary professional skill and care in preparing his plans and specifications, or in supervising the work under his charge. Within this limit, however, he is held to a strict accountability. The reports of French courts have contained, in past years, accounts of cases in which this accountability has been enforced with what seems cruel severity, and the modern French architects complain, apparently with reason, that architects are held responsible for mishaps which, if they were to occur in buildings constructed under the charge of engineers, would be looked upon as cases of *force majeure*, or as the result of an excusable oversight.

**The Responsibility of the Architect, as Distinguished from that of the Builder.**

One reason for this is that architects are nowhere, except, perhaps, in Germany, organized as closely in defence of their common interests as engineers, and the world is always disposed to crowd a little those who are too feeble to defend themselves.

In this country, where the standard of practical knowledge in the profession is probably higher than in France, the dread of expert investigation into their work seems to be much less common among architects, but it is probable that there would not be much difference in the strictness with which they would be pursued for a real fault. In a California case, Moore &



*Boswell vs.  
Laird,  
8 Calif. 400.*

Foss, a firm of architects, of reputed skill, contracted to build for Laird & Chambers a dam, to be 40 feet high, and to be capable of resisting all floods and freshets for two years after completion. Before the dam was fully completed, it was washed away, and the water destroyed a store, and other property, situated on the stream below. Suit for damages was brought against Laird & Chambers, the owners of the dam. It was proved that they had not visited the dam from its commencement until after the break; that they had prescribed no plan, and furnished no materials, and had not received the work from the contractors. It was also proved that the plaintiff, Boswell, had been notified, fifteen hours before the dam gave way, of the anticipated danger, but had paid no attention to the warning. The court held that Moore & Foss, the architects, or rather, in this case, the contractors, were responsible for the damage, and not Laird & Chambers.

**Architect's  
Responsi-  
bility to the  
Public.**

*Lottman vs.  
Barnett,  
62 Mo. 150.*

A case more in point is one decided in Missouri some years ago.

A building was in process of erection under the "general charge and superintendence" of an architect. A part of the construction of the building consisted in a wall supported by iron tubular girders, resting on cast-iron columns, extending through two stories, with flanges cast on them at the level of first-story floor, to receive the ends of the first-floor girders. There was some evidence to show that the tubular girders were of light and cheap construction.

Two of the columns settled, breaking the iron plates and bed-stones under them. The architect advised the owners to raise the columns that had settled, and to employ one Bashore to do the work. During a consultation between the architect and the owners on the subject, Shickle, a member of the firm which supplied the iron-work, learning that the architect proposed to put jack-screws under the flanges of the columns, at the first-floor level, advised him not to do so. The architect, however, apparently after consultation with Bashore, ordered them to be raised in that way. One column was thus successfully raised, but in raising the second, the cap, on which the

second-story girders rested, broke off, letting the girder drop. There seems to have been no attempt to shore up the walls between the columns, and the dropping of the end injured the girder so much that it gave way, bringing down the wall that rested on it. A workman was killed by the falling masonry, and his widow sued the architect for five thousand dollars damages for the loss of her husband, alleging that the catastrophe was due to his negligence. There was evidence to show that it was doubtful whether the construction would have been permanently secure in any case, owing to the weakness of the girders and columns; and it was proved that the architect was absent at the time of the raising of the column.

**Raising Columns.**

The defence rested on the ground that no negligence of the architect was shown, and that, in any case, he was only the agent of another person, and not himself responsible for any omission to do his whole duty.

The jury found a verdict for the widow, in the full sum claimed; and the Supreme Court sustained the verdict, saying that an architect "having the general charge and superintendence of the construction of a building, was held to be responsible for the killing of a workman caused by the falling of a wall, which resulted from the giving way of supports on which it rested, under the working of a jack-screw, although the appliance was put to work under the immediate direction of another person employed by the owner of the building, and while the architect was absent, where it appeared that the manager of the jack-screw was employed under the advice of the architect, and subject to his direction, and that he knew and approved of the method adopted for effecting the raising. Whether the wall fell because the plan for raising it was a bad one, or because the supports were inadequate, in either case the disaster was attributable to positive misfeasance for negligence in a work which the architect undertook, but in which he failed to exhibit the care and skill which the law imposed upon him. For such negligence he was responsible, not merely to his employer, but to those injured in conse-

*Lottman vs.  
Barnett,  
62 Mo, 159.*

"quence, and the question whether, and in what respect, he  
"was guilty of negligence, was one for the jury, under appro-  
"priate instructions. The doctrine that agents are not re-  
"sponsible to third persons, for mere nonfeasance, has no appli-  
"cation to such a case."

*The Archi-  
tect's Re-  
sponsibility  
for the Cor-  
rectness of  
his Certifi-  
cates.*

A case of considerable importance, involving the responsi-  
bility of an architect for a certain part of his work, was  
decided in Canada a few years ago. It seems to be the only  
case, decided in a court of record, covering this particular point,  
so that it seems proper to refer to it, although it may be doubted  
whether it would be followed as a precedent by our courts.

*Irving vs.  
Morrison,  
27 C. P.  
(Upper Canada)  
242.*

An architect named Irving was engaged to plan and superin-  
tend a house, to cost \$25,000, and was to give certificates from  
time to time, for 85 per cent of the value of the work done.  
There were several contractors. One of the contractors failed  
while the work was going on. At the time of his failure,  
he had received certificates to the amount of \$2,950, and this  
amount had been paid him by the owner, on the presentation  
of the certificates. The owner was obliged to complete this  
contractor's work, at an expense much exceeding the balance  
due him under the contract; and it was ascertained that, at  
the time of his failure, the actual value of the work he had  
done was only \$2,700, and he ought, under the contract, to  
have received certificates for only \$2,295.

When the house was done, the owner refused to pay the  
architect, who sued him for \$910, being a balance of \$900 on  
his commission of 5 per cent, with \$10 for advances for advertis-  
ing. The court held that the architect's estimate of the amount  
due him was correct, but that the owner was entitled to deduct  
from this \$655, being the difference between \$2,950, the  
amount he had actually paid the defaulting contractor, and  
\$2,295, the amount which ought to have been certified as due  
him. The case was appealed to the Court of Common Pleas,  
which confirmed the decision of the court below.

There are some legal principles which modify the responsi-  
bility of architects, as well as of all other persons under similar

circumstances. For example, if a person works gratuitously for another, he is not bound to so strict a responsibility as if he is paid for his services. In the language of the law, he is then not liable for negligence, unless the negligence is gross. However, the injured party naturally thinks that any negligence is gross, and tries to impress his opinion on the court, so that too much reliance should not be placed upon this exception. As an instance of what is legally gross negligence, the books give a case in which an over-obliging individual gratuitously collected \$140 in rents for another person, and, instead of forwarding the money at once, left it with his sister, from whose house it was taken by a burglar.

He was sued for reimbursement of the lost money, and the case was carried to the Supreme Court of Illinois, where a majority of the judges decided that his conduct, in leaving the money with his sister, was gross negligence, and that he must make the amount good.

Where damage results from the negligence of any person, it seems to be the law that the injured person cannot recover interest upon his claim; and it has been held in New York, apparently upon good authority, that there can be no recovery of damages for injury to the person through any one's negligence, against the representatives of the wrong-doer after his death.

**Legal Principles  
Modifying Re-  
sponsibility.**

**Hindman vs.  
Borders,  
89 Ill. 336.**

**Damhorst vs.  
Mo. Pac. R. R.  
Co.,  
32 Mo. App. 350.**

**Norton vs.  
Wiswall,  
14 N. Y. P. R.  
42.**

CHAPTER V.  
THE ARCHITECT'S AUTHORITY AS AN EXPERT.

**Extensive  
Authority of  
the Architect  
in his own  
Province.**

**W**ITHIN his own province, as a man skilled in the art which he professes, the authority of the architect is very considerable. In practice, his authority over the contractors in any particular case is usually fixed by the terms of the contract between the contractor and the owner, but even then the law generally interprets any doubtful expressions in such a way as to favor giving the largest discretion possible to the architect, or whoever may stand in the place of the architect as the skilled director of the work.

**Chapman vs.  
Lowell,  
4 Cush. 378.**

In a Massachusetts case, a contractor agreed to build drains for a city, in a skilful and workmanlike manner, under the general direction and superintendence of a committee, and to cause the work to be carried forward and finished with as much rapidity as it could reasonably and beneficially be done. One drain was built, and preparations made for beginning the other, when, about the middle of October, the committee ordered the work stopped. It was resumed the next spring, completed and paid for; but the contractor made an additional claim for damages for having been prevented from carrying on his work in the autumn before. The Supreme Court held that, "by reserving to the committee a general direction "and superintendence, the plaintiff agreed to conform to the "reasonable directions of the committee, as to the time of "doing the work, of which they were to judge, acting with "an honest and just regard to the interests of the city.

**A Authority  
of Superin-  
tendent Ex-  
tends to Time  
when Work  
shall be done  
as well as to  
Materials  
and Work-  
manship.**

"Under this stipulation they were not to act arbitrarily, "capriciously and unreasonably, but, exercising an honest and "reasonable judgment, the plaintiff, by his contract, bound "himself to conform to it, and the city is chargeable with "no breach of contract."

It is probable that an architect, as being more skilled in the sort of work under his charge, and less likely to be biassed in any way, would find his discretion sustained by a court under similar circumstances, at least as completely as that of a committee, but the question does not seem to have come before our highest courts.

Architects, however, often have to appear before judges and juries, and the respect felt for their opinion is shown by the fact that a controversy between an owner and a contractor is almost always decided in conformity with the architect's judgment of the matter. Where architects are called as experts before a court, it is well for them to remember that they are entitled to privileges far beyond those accorded to ordinary witnesses; and, as the opposing counsel generally knows that their testimony will have great weight with both judge and jury, and will do his best to confuse them, so as to diminish the force of their evidence, they should not allow themselves to be hurried, but should insist upon having questions clearly put, and should take time enough to make sure of the correctness of their replies.

The main distinction between an expert witness and one of the ordinary kind is that the former alone is allowed to testify to his opinion, while the latter can testify only to facts. Theoretically, all testimony should concern itself exclusively with facts, but the law holds that, in certain cases, ordinary jurymen have not the special knowledge which will enable them to understand the facts shown, without interpretation, and a person skilled in the interpretation of such facts may be called in to assist them.

An expert witness, however, can give an opinion only as to matters in which he is specially skilled. In other matters he

**Architects  
as Expert  
Witnesses.**

**Daniels vs.  
Mosher,  
2 Mich. 183.**

**Harris vs.  
Panama R. R.,  
32 N. Y. 427.**

**People vs.  
Hall,  
48 Mich. 482.**

**Dewitt vs.  
Barley,  
9 N. Y. 371.**

**Daniels vs.  
Mosher,  
2 Mich. 183.**

*Daniels vs.  
Mosher,  
2 Mich. 183.*

can testify to facts only, leaving the court to draw its own conclusions from them.

*Keith vs.  
Lothrop,  
10 Cush. 453.*

*Hitchcock vs.  
Bengett,  
38 Mich. 501.*

Unlike other witnesses, an expert is allowed, and generally required, to form the opinion which he is called upon to give from the accounts given of the facts by others. If he has personal knowledge of the facts in the controversy, his testimony will be so much the more valuable, for no one can observe the facts so intelligently as he; but in this case he must be prepared to give a full description of the facts on which his opinion is based. It has been held in Michigan that "an expert cannot give an opinion based on his personal examination unless the facts on which the opinion is founded are all stated," and he must endeavor to give the court a perfectly impartial and conscientious account of what he has seen, and what he thinks about it.

*People vs.  
Hall,  
48 Mich. 482.*

*Jewitt vs.  
Brooks,  
134 Mass. 505.*

In most cases, however, he is not personally acquainted with the circumstances, and must hear them from others. He is then generally called in to listen to certain portions of the evidence, from which his opinion is to be formed; or he may be obliged to satisfy himself with reading a stenographic report of the testimony, or even with hearing a lawyer's version of it. Where facts are disputed, the expert may be called upon to say what his opinion would be in either case; but it has been held that experts are not obliged to form an opinion on theoretical propositions, and that they cannot be examined upon theories that are contrary to the uncontradicted facts of the case.

## CHAPTER VI.

### THE ARCHITECT AS AGENT FOR THE OWNER.

**T**HE question of how far the architect is an agent for the owner, and is empowered to bind him by his actions or decisions, is one of extreme importance to the profession. The ordinary contract between owners and builders leaves this point somewhat indefinite, and architects, particularly the young and zealous ones, frequently get into trouble through not knowing how far they are entitled to help their employer without his consent.

The general rule is that "whatever may be necessary to complete an act that an agent is authorized to perform is included within the authority of the agent." This rule was laid down by a New York court, in a case where the Springfield Iron Company had bought six hundred tons of old rails, which were, apparently by some mistake, landed on a wharf in New York. This landing was not by direction of the iron company, and it was not liable for the wharfage on the rails. The company sent a salesman, named Mack, to New York, to hurry forward the rails in all possible ways, and instructed him to see that there were no delays in shipping them, as it was important for the company to secure them at once. When all but seventy-five tons of the rails had been shipped, the wharf company refused to allow these to be removed, saying that it must keep these until its bill for wharfage, amounting, with the interest at the time of bringing the suit, to nine hundred and ten dollars, was paid. Mack asked the wharf company to let

**How far  
can the Ar-  
chitect Bind  
the Owner?**

**General  
Rule.**

**Robinson vs.  
Springfield  
Iron Co.,  
39 Hun. 634.**



**Robinson vs.  
Springfield  
Iron Co.,  
39 Hun. 634.**

the rails go, saying that his company was good for the amount of the bill; but the wharf company replied that it had a lien on the rails for the charges, and would not let them go until they were paid. Mack replied, in substance, that it was of importance to his company to get the iron through, before the canal closed, and that his company would pay the bill; and the wharf company then allowed it to be removed. There was some difference in the testimony as to Mack's exact words. The iron company, after it got the rails, refused to pay the wharfage bill, on the ground that Mack was not authorized to make such a contract on its account; but the court held that he was sufficiently authorized, and that his contract was binding on the company.

**Implied  
Authority in  
Matters of  
Construction.**

In the case of architects, the rule appears to be that, outside of the duties expressly mentioned in the contract, they are impliedly authorized to order, and to bind the owner to pay for, work and materials which may prove to be necessary for securing the safety of the building under unforeseen contingencies, and even in cases where more mature consideration shows that it is necessary, for the same end, to vary from the letter of the original contract.

**Commissioners  
vs.  
Motherwell,  
123 Ind. 364.**

A Board of County Commissioners, in Indiana, contracted with a builder for the construction of a building, according to certain plans and specifications. The contract provided that the Commissioners might order changes from the plans and specifications, "the value of said change being first agreed on in writing, and the subsidiary contract endorsed on or attached to this contract." Nothing was said, apparently, about the architects having authority to order changes, but McDonald Brothers were named in the contract as the architects to superintend the work on behalf of the Commissioners, and the work was to be performed under their supervision. During the progress of the work, one of the McDonalds ordered certain iron columns to be made eight inches in diameter, instead of six inches, as shown by the plans and specifications. No contract was made in regard to the change, nor did the Commissioners,

or any person for them, ever ask for any agreement as to the price of the extra work. The building was finished, and accepted by the Commissioners, and a charge made for the extra weight of columns, which the Commissioners refused to pay, on the ground that the extra work and material were not ordered as the contract provided. The case was brought before the Supreme Court, which said, confirming previous decisions to the same effect, "it has been held by this Court "that where the Board of Commissioners has power to appoint "a superintendent to act for them in the supervising of work, "he becomes the agent of the county for the purpose of constructing the work, and that he may bind the county for "work done beyond that contemplated by the written contract."

On the other hand, where the contract authorizes the architect to order extras, but specifies the manner in which he shall do so, he must be careful to give his orders in the way prescribed. In a Missouri case, the superintendent was authorized by the contract to order variations, but in case of omissions or additions, the cost or expense thereof were to be agreed on in writing, signed by the contractor and superintendent, "before the same should be done, or allowance claimed therefor." The superintendent certified to the value of work done, and it was claimed that his certificates included allowances for extra work, although the signed orders for such work were not produced. The Court of Appeals held that the superintendent had no power to waive the requirements of the contract in regard to orders for extra work.

One of the most curious instances of an architect's exceeding his authority is to be found in the French books. One Savoye was architect of the church of Saugnière. He was authorized by the contract "to order works omitted or overlooked in the specification, and to provide for contingencies which might arise during the execution of the works"; and the contractor, Duchez, was bound by his contract to obey Savoye's orders. Savoye, without consulting the officials of

*Benton Co. vs.  
Patrick,  
54 Miss. 240.*

*Board vs.  
Byrne,  
67 Ind. 21.*

*Bass vs.  
Board,  
115 Ind. 234.*

*Board vs.  
Hill,  
122 Ind. 215.*

*Ahern vs.  
Boyce,  
19 Mo. App. 552.*

*A French  
Instance.*

*Commune de  
Colombier-Saug-  
nière vs.  
Duchez et Sa-  
voye,  
Dalloz, 1883,  
3.92.*

Commune de  
Colombier-Sau-  
gni re vs.  
Duchez et Sa-  
voye.  
Dalloz, 1883,  
3.92.

the town at whose expense the church was to be built, practically substituted a new plan for that which had been officially approved. He increased all the dimensions of the building after the contract was made, thereby adding 12,675 francs to the cost, and ordered changes in details of construction and decoration to the value of 5,000 francs.

The town refused to pay the bills for these extras, and the case came before the highest court, which held that if the enlargement of the building did not better adapt it to the requirements of public worship in the district of Saugni re, so that the commune received some benefit from the change, Savoye must pay the cost himself. In regard to the other extra charge, of 5,000 francs, the court found that a portion was for "changes in detail fully justified by the necessities of good workmanship," but that 2,000 francs of the extra expense "had been incurred through the exaggerated importance attached by the architect to the interior decoration, and "the details of the tower, the entrance door and the windows." Of the cost of the increased size, the experts found that the commune should bear a part, as being to a small extent benefited; but Savoye was condemned to pay a total of 10,500 francs.

**Danger to  
Architects in  
Ordering Ar-  
tistic Extras.**

The lesson afforded by this case in regard to the danger of trying to improve the artistic effect of their clients' buildings without their knowledge will not be lost upon architects; but there are other ways in which it is easy for an architect, in his anxiety to promote his employer's interest, to overstep his legal authority, to his own detriment. Nothing is more common, for example, than for architects to order mantelpieces, or tiles, or gas-fixtures, or similar objects, for their clients, knowing that they are needed, and supposing that the owner will be glad to avail himself of their greater knowledge of the market and more educated taste.

In the majority of cases the result bears out this supposition, and both architect and client feel that the former has rendered a favor in performing, either gratuitously or for a

small fee, as included in the general commission on the cost of the building, a service for which a much larger commission is properly payable; but it sometimes happens that a client chooses to repudiate the transaction, and the architect may make the unwelcome discovery that he has made himself personally liable to the dealer for the amount of the purchase-money. It is, of course, to be understood that the client cannot repudiate the purchase and at the same time enjoy the benefit of it, and, if he keeps the mantels or gas-fixtures which the architect ordered for him, he ratifies the architect's action, and must pay for them; but he can, if he chooses, refuse to keep them, and the architect will then have them thrown on his hands, while, if the articles so purchased were built into the structure, so that they could not be removed without great injury to the building, a court might hold that the owner was entitled to keep them, paying only what the jury might determine that they were actually worth to him, and the architect would be liable to the dealer for the balance of the price.

To avoid such mishaps, the architect should be sure to obtain special authority before making any purchases on behalf of his client. In cases of constructive exigency he would probably be sustained in ordering materials and work; as, for instance, if an iron column, after being set in place, should be broken by an accidental blow, as sometimes happens, the architect not only may, but should, order the shoring necessary to keep the superstructure from falling, and the owner will be bound to pay for it; but he has, unless the contract, or some special authority, gives it to him, no right to purchase goods for his employer which are not required for some such purpose.

In Wisconsin, one Kline, a builder, contracted with McDonnell to furnish all materials and do the mason-work of a house, under the direction of an architect, who was to render the usual professional services, with the addition that McDonnell, the owner, put into his hands the money to pay for the mason-work under the contract, arranging that, as it became due, he should pay it out on Kline's order. Kline ordered

**Mantels,  
Tiles, Etc.**

**Special Au-  
thority Nec-  
essary for  
Purchasing  
Artistic  
Goods.**

**Dodge vs.,  
McDonnell,  
14 Wis. 553**

**Dodge vs.  
McDonnell,  
14 Wis. 553.**

some lime of one Williams. Williams presented his bill to the architect, who said that he would pay it out of "the next estimate." Before the next payment became due to Kline under the contract, he stopped work, and never completed his contract. Williams assigned his claim to Dodge, who sued McDonnell for the price of the lime, claiming that it was ordered by the architect for him, or rather, that the architect, having promised to pay for it, bound McDonnell.

**Deposit of  
Money by  
Owner in  
Architect's  
Hands Does  
not Make  
him Owner's  
General  
Agent.**

The Supreme Court said that the inference that a man who employed an architect to render the usual services of architects, and engaged a contractor to furnish the materials and do the work, and placed the money due the contractor in the architect's hands, to be paid on the contractor's order, made the architect his general agent, and authorized him to bind him by new and independent contracts with other parties, was entirely unwarranted. It was natural for the architect, supposing that Kline would go on with the contract, to tell Williams that his bill would be paid out of the next instalment, but this did not bind McDonnell. The debt was evidently Kline's, and the plaintiff had no ground of action against McDonnell.

**How Far  
can an Archi-  
tect go in In-  
specting Con-  
cealed Work?**

How far an architect can go in carrying out his undoubted duty, that of endeavoring to see that the contractors comply with their agreements, is, unfortunately, not determined. There is no question that here the architect is agent for the owner, but the owner's rights are as undefined as his own.

Where a contractor has done work which is visibly not in accordance with the plans or the specification, there is no doubt that he can be required by the owner, or by the architect, under the usual contract, to pull it down, and do it over again; but a difficulty arises in cases where work is concealed immediately after it is put in. In such cases, the architect may have grave suspicions that the concealed work is not what it should be, but, under the ordinary contract, neither he nor the owner can compel the contractor, at his own expense, to tear down work already done in accordance with the contract, in order to see whether it does not conceal other work in violation of the con-

tract. Under the ordinary provisions for ordering extra work, the architect or owner may require the contractor to remove the good work for the purpose of making the investigation, and if the work concealed behind it proves to be bad, the contractor will be bound to pay all the cost of pulling down and replacing the good work by which the bad was concealed, as well as that of making good the defective work; but if the architect's suspicions should prove not to be justified, it seems to be the law that he will have to pay the cost of making the investigation. This might be a serious matter for an architect conscientiously bent on satisfying himself that every part of a building was strictly in accordance with the contract, and it is desirable that a clause should be inserted in building contracts, providing for the inspection, at the contractor's expense, on the demand of the architect, of work which cannot be properly examined during the architect's ordinary visits of supervision.

For example, there is no way of determining the thickness of the shell of cast-iron columns, except by drilling several holes in each column. The thickness of shell of one column of a series, as ascertained by drilling, affords no evidence regarding the other columns of the same series; and the thickness often varies in the same column from that of a sheet of paper to nearly two inches; so that the only way of making reasonably sure of the adequacy of the supports on which the safety of the whole building and its inmates may depend, is to drill every column in at least three places. This is made compulsory by law in many cities, and it ought always to be done, at the contractor's expense; and there are several other points where similar investigations should be provided for in the contract, to be held at the contractor's expense.

In any event, the architect must remember that his authority is strictly limited by the plain terms of the contract, and that he has no right to excuse the contractor from any of its provisions, or to change them in any way. A contractor in Kansas City, named Burke, agreed to build a sewer, according to certain plans, profiles and specifications, and according to the

**Thickness  
of Metal in  
Columns.**

**Architect  
has no Au-  
thority to  
Change Con-  
tract.**

Burke vs.  
Kansas City.  
34 Mo. App. 570.

*Burke vs.*  
Kansas City,  
34 Mo. App. 570.

*Starkweather*  
*vs.*  
Goodman,  
48 Conn. 101.

*Stuart vs.*  
Cambridge,  
125 Mass. 102.

*Cooper vs.*  
Langdon,  
9 M. & W. 60.

**Contractor  
Cannot be  
Excused by  
Superinten-  
dent from  
Fulfilling his  
Agreement.**

*Bonesteel vs.*  
Mayor of New  
York,  
22 N. Y. 162.

**Rock Exca-  
vation.**

directions of the city engineer; and it was provided that any workman who refused to follow the directions of the engineer should be discharged. Felix, an assistant engineer, was detailed to supervise the work, and, according to the evidence, ordered some 600 feet of trench to be dug, and a corresponding amount of pipe laid, at a less depth than the plans and specifications required. Felix was then superseded by Baker, who discovered the variation from the plan. The contractor was then ordered to take up the pipes laid under Felix's direction, dig the trench to the grade shown on the plans, and relay the pipes. He did so, and claimed payment for doing so, as extra work. The city refused to pay, and the case came to the Court of Appeals, which held that the engineer's duty was to see that the contract was complied with, not violated, and he had no authority to give directions varying from the plans and specifications; and, Burke having done only just what he agreed to do under the contract, the city was not liable for any extra payment on the facts presented.

A leading case involving the same point is that of *Bonesteel vs. Mayor of New York, etc.* The Street Commissioner of New York advertised for proposals for grading a portion of 70th Street, from Tenth Avenue to the North River, the rock to be excavated one foot below the curb, and deposited in the river, in extension of the street. McDonald was the lowest bidder. The bids were laid before the Common Council, and an award of the contract to McDonald confirmed. Two months later, the Street Commissioner, in behalf of the city, and in pursuance of the authority conferred by the confirmation of the award made by him to McDonald, entered into a written contract with McDonald to do the work, but in this contract varied from the specifications on which the original estimate was made, by providing that the rock should be excavated to a depth of two feet below the curb, but that the excavated rock should belong to the contractor, he furnishing an equal quantity of earth, and depositing it in the street where required. The written contract, as well as the ordinance of the Common

Council authorizing the grading of the street, provided that the work should be done "under such directions as should be given by the Street Commissioner and one of the city surveyors."

*Bonesteel vs.  
Mayor of New  
York,  
22 N. Y. 182.*

Before any work was done, McDonald assigned his contract to Bonesteel. The city surveyor in charge directed Bonesteel to excavate the rock only to a depth of one foot below the curb, and he complied with this direction, but instead of putting the excavated material in the river, as was provided in the original specifications, he put only a small part there, and kept and sold the rest. On the completion of the work, he demanded payment of the contract price, which was refused, on the ground that the contract had not been performed. The case was brought before the Court of Appeals, which held that "the provision of the ordinance that the work should be 'done under such directions as should be given by those officers' (the Street Commissioner and City Surveyor) 'conferred no authority on them, or either of them, to change 'or modify in any essential particular the provisions of the 'contract made and entered into for the performance of the 'work.'"

Although Bonesteel had complied with the original contract in regard to depth of excavation, he had violated it in selling the stone, and, the contract being entire, he could recover nothing.

A very similar case was decided and commented upon by an equity court in New Jersey. Here a contract was made for paving in the city of Newark, to be done under the direction of the Street Commissioner, and to the satisfaction of the Committee on Streets and Highways. All work and materials were to be subject to the inspection and approval of the Street Commissioner. The work was done, and the inspectors appointed by the Street Commissioner, the Street Commissioner himself, and the Committee on Streets, all approved the materials and the work, on the ground that, although not literally or substantially in accordance with the contract, the paving

*Bond vs.  
Newark,  
4 C. E. Gr. 376.  
(19 Equity Rep.,  
N. J.).*



**"A Good  
Job, on the  
Whole."**

**Bond vs.  
Newark,  
4 C. E. Gr. 376.  
(19 Equity Rep.,  
N. J.).**

was done as well as such work was usually done, and was, on the whole, a good job. Some of the abutting owners, whose property would be assessed to pay for the paving, headed by a Mr. Bond, applied to the proper court to prevent the city from paying the contractor, and a temporary injunction was issued. The Common Council then passed an order, which was approved by the Mayor, directing that the contract price should be paid in full as soon as the injunction should be removed. On the trial of the case, the court said that, although the Street Commissioner, with the other officials named in the contract, were the proper persons to inspect and approve the work under the contract, and their decision as to whether the paving was done in a workmanlike manner, or whether the materials were good, might, perhaps, be binding, they had no power to dispense with the contract, or anything that it expressly required. "An architect," said the decision, "to whom, "by the contract, everything was to be referred, could not hold "that a brick house was a compliance with a contract to build "one of marble, or that a wall twelve inches thick complied with "a contract to make one of sixteen inches. He could determine whether the marble front, the brownstone steps or the "sixteen-inch wall were put up in a workmanlike manner, but "could dispense with no substantial matter expressly required "by the contract. Such approval would not entitle the contractor to recover at law."

In the case in question, the street having been accepted, and for some years in use, the court said that it would not be equitable to compel the contractor to put his work in the condition required by the agreement, and a master must be appointed to ascertain how much more it would have cost the contractor, at the time when the work was done, to have complied strictly with the contract, and that this sum should be deducted from the contract price before paying him.

**Certificates  
and Orders  
must be in  
Form Specified by the  
Contract.**

Even in regard to the manner of issuing certificates, of giving orders for extras and estimating the payments due, the terms of the contract must be strictly followed. In Illinois,

where a contract provided that the architect should "settle deductions or additions, and determine amount of damages which may accrue from any cause," and the architect, in regulating the mason's account, charged him with \$350 damage to the carpenters for delaying them, the Supreme Court held that the architect had no right to fix the damage that the carpenters had sustained, and, until they claimed such damage of the owners, and the amount had been ascertained, the architect had no right to consider it in any estimate he might make.

It was also held that the architect has no right to ascertain and allow other payments from the owner to the contractor, and that, so far as his statement of accounts between the parties includes such charges, it is unwarranted, and not binding on the parties.

In an Illinois case, where work was to be done for a county, under the direction of a firm of architects, who, under the contract, were to supervise the work, and give certificates for payments, the principal contractor fell into difficulties, and one sub-contractor, named Bouton, refused to go on. The architects arranged with Bouton and the principal contractor, that the certificates should be given directly to Bouton for his part of the work. The other sub-contractors contented themselves with getting orders from the principal contractor for the money due them, and these orders were accepted and paid, but the certificates given to Bouton were not honored. After a time, the principal contractor failed, and the county had to get his contract completed by other parties, and expended all the rest of the contract price in doing so. Bouton then sued for payment of the certificates which the architects had given him, but the Supreme Court held that, although the principal contractor had agreed to the arrangement by which the certificates were transferred from him to Bouton, the county was not bound by it, and the architects were not the agents of the county for such a purpose. The Court said that, although it seemed hard that the other sub-contractors should be paid in full, and Bouton, the one who relied on the architects, should not, still, the others

*Mills vs.  
Weeks,  
21 Ill. 561.*

**Architect  
must not Con-  
sider Other  
Accounts Be-  
tween Owner  
and Contract-  
or.**

**Architect  
cannot give  
Certificates  
to Sub-Con-  
tractors.**

*Bouton vs.  
Supervisors,  
84 Ill. 384.*

had showed superior vigilance in going to the supervisors, the proper parties; and as their claims, with the cost of completion, exhausted the contract price, the county could not be held to pay more.

**Unless Authorized by the Contract, Architect cannot Employ Others to do Contractor's Work.**

**Very Important that Such Authority Should be Given.**

*Campbell vs. Day,*  
90 Ill. 363.

An architect has, moreover, no authority, unless it is expressly given him by the contract, to employ other persons to do work in a building which the contractor has undertaken, by his contract, to do. It is, in practice, very important that this authority should be given, for architects often find that the owners have made contracts for work with persons who are utterly incapable of doing it, but who, relying on their contract, keep the rest of the work waiting for their futile pottering, until the owner, in despair of getting his building finished, and knowing that no damages for delay can be collected from them, pays them their money to get rid of them, and employs some more competent person to carry out their contract. The architect's natural impulse in such cases is to eliminate the incompetent mechanic as soon as his incapacity begins to be manifest, which is usually at an early stage of his proceedings; but this can only be done in such manner as the contract provides, and not at all, unless there is some stipulation to that effect. An architect in Illinois, employed to supervise and direct the work done under a certain contract, found that the brick piers were giving way, owing, as it proved, to bad workmanship. A sub-contractor was furnishing cut stone for the building, and the architect ordered him to put in stone piers, in place of the brick ones, without knowing that he was a sub-contractor, and supposing that the order was really given through him to the principal contractor. The owners saw the stone piers being built by the sub-contractor, but made no objection. When the sub-contractor sent in his bill for the stone piers, the owners refused to pay it, and he brought a suit, which was carried to the Supreme Court. This court held that the architect had no authority to engage others to do the work of the principal contractor; and, in answer to the argument that the owners, who saw the sub-contractor doing the work, without

objection or inquiry, thereby accepted the benefit of his labor, it held that they had a right to suppose that it was being done for the principal contractor.

An architect, within his own province, like any other agent, must exercise his functions in person; he cannot delegate his authority to any one else. He must also see that his delegated powers are exercised in a just and reasonable manner.

While the utmost respect is generally shown by courts for his discretion, where he has conscientiously exercised it, his mere arbitrary caprice cannot be enforced upon any one in place of the well-considered judgment which is expected from a man of science and honor.

A contract for a building for the Edison Electric Company, in Minnesota, provided that, if the contractor failed to comply with its conditions, the architect should be entitled to take possession of the building. The architect did so, on the ground of failure to comply with the contract, and the contractor sued for damages for being prevented from completing his contract. The official Inspector of Buildings made an examination of the building, and a report, which was put in as part of the evidence for the defence. The judge, in the court below, allowed the jury to consider whether the contract had really been complied with, and the defendant's counsel objected, claiming that the architect's discretion was final, and not subject to review by the jury, and that, if it were not final, the evidence of the Building Inspector was conclusive, and other evidence should not have been admitted.

The Supreme Court rejected both these claims, saying that the right of the architect to take possession of the building did not depend upon his mere arbitrary discretion, and that, in an action for damages for interference with his contract, the contractor was entitled to have the issue tried, to see whether he had fulfilled it. As to the inspector, the court said that the contract made no provision that he should be arbiter between the parties, or that his decision should be final, and the city ordinances did not give any such effect to his decision. A

**Architect  
Cannot Dele-  
gate his Au-  
thority.**

*Sheldon vs.  
Sheldon,  
3 Wis. 690.*

*White vs.  
Harrigan,  
41 Minn. 414.*

builder might be prosecuted and fined for bad workmanship and materials, and in such case he would be entitled to be heard on the question of fact.

**Architect  
must be Hon-  
est.**

It hardly seems necessary to say that the architect must be perfectly honest in all his dealings with his employer, and must not use his position as a trusted agent for his private gain. It speaks well for the character of the profession that there seems to be no record of a suit brought against an architect for dishonorable practices in the higher American courts, nor, so far as the digests show, in those of any other country, although in two English cases the owner has alleged fraudulent acceptance of gratuities from tradesmen as an excuse for not paying the architect's bill; and, in general, the tendency of judges appears to be to assume that architects are worthy of confidence, unless direct evidence is brought forward to the contrary.

**Norris vs.  
Day,  
10 L. J. N. S. 43.**

**Shaw vs.  
Andrews,  
9 Cal. 73.**

In a California case, an architect, with another person, entered into a contract to construct a building, and the owners made a separate engagement with the architect-contractor that he should superintend the work. When the building was done the owners refused to pay for the superintendence. The architect sued for his money, and the owners claimed that it was against public policy for a person to act as contractor and superintendent at the same time, on the principle that an agent must not deal with himself; and that, therefore, the contract for superintendence was void, that for the erection of the building having been carried out in full. The verdict in the lower court was for the plaintiff, and it was sustained by the Supreme Court, which said that, although the duties of a superintendent in some respects conflicted with the interest of the contractor, still, if the defendants, knowing his position, chose to rely on the architect's good faith and honesty, there was no reason why he should not be paid for the discharge of his duties, which were not claimed to have been neglected or unsatisfactorily performed.

Although the presumption in regard to architects, which is

certainly borne out by the facts, is that they are generally honest, it is not uncommon to hear bad faith attributed to them by disappointed mechanics and other persons, who, as Cardinal Mazarin said, are disposed to impute to people in positions of responsibility the actions of which they would themselves be guilty if they held those positions. Curiously enough, however, although architects indignantly resent an accusation of dishonesty of this kind, it does not appear to be regarded by the rest of the world as a very serious matter. We have seen that the court, in the case of *Gilman vs. Stevens* (page 45), thought that the fact of the architect's having taken "loans" from the builder "was not to be considered a question in the case," unless fraud or collusion were charged; and, in a singular Missouri case, a similar view appears to have been taken. In this controversy, an architect of St. Louis, named Legg, brought an action for libel against a certain Dunleavy and others, complaining that on several occasions the defendants published and caused to be shown an affidavit, signed by Anthony Dunleavy, saying that on a certain day he, the said Dunleavy, was a member of the firm of John E. Oxley & Co., doing business in St. Louis; that the said firm on that date (June 1, 1873), made a proposition to do the galvanized-iron, tin and copper work on a certain building of which Legg was the architect, and that Legg promised Oxley, the other member of the firm, to give the said firm the contract for the said work, provided the sum of \$200 was paid to the said Legg as commission by the said John E. Oxley & Co.; that Oxley agreed to pay it, and informed Dunleavy so, and Dunleavy paid the \$200 to Legg, the last payment being made on June 9, 1873.

Legg claimed that he had "always demeaned himself with honesty and fidelity, and had never been guilty of any misconduct or malpractice in his said capacity and profession of architect and superintendent," and that he had been damaged to the amount of \$50,000 by the circulation of this affidavit, which was dated August 6, 1879.

The Supreme Court held that the petition "does not state a

**The Public  
Idea of Hon-  
orable Prac-  
tice.**

**Legg vs.  
Dunleavy,  
80 Mo. 558.**

**Accusation  
of Taking Il-  
legal Commis-  
sions Not Li-  
bellous.**

cause of action." "In what manner," said the Court, "does the affidavit of Dunleavy blacken the reputation of the plaintiff? It, in substance, alleges that the plaintiff was supervising architect of a certain building, and that the defendants paid him a commission to give the defendants the contract for certain work thereon. Suppose that was true, how would it show that the plaintiff was degraded or brought into contempt or ridicule? The words, to be actionable *per se*, must be such as, if true, would disqualify him or render him less fit properly to fulfil the duties incident to the special character he has assumed." "Words to be actionable on this ground, (as disparaging the plaintiff in his calling) must touch him in his office, profession or trade." "They must impeach either his skill or knowledge, or his official or professional conduct." "A false charge . . . must blacken the memory of the dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule. In our opinion the affidavit in this case does neither, and is therefore not actionable *per se*."

"Where words are charged," the court went on to say, "that are not actionable without a knowledge of some extrinsic fact, it is necessary to set forth that fact by way of preliminary averment, . . . which is not done in this case." What the nature of the extrinsic fact might be, which, added to Mr. Dunleavy's affidavit, would make it libellous, the report of the case does not say, but the judges repeated, later, that "If this is a libel of the plaintiff in his business, it must be so on account of some extrinsic fact, or some special obligation he was under to his employer. . . . If so, his petition must allege it."

**Commis-  
sions from  
Contractors  
Cannot be  
Collected.**

**Atlee vs.  
Fisk,  
75 Mo. 100.**

If an architect should be so dishonorable as to make an agreement for the payment to him of a commission by a contractor, in the manner alleged by Mr. Dunleavy, he could not enforce it, and the contractor who made such payments would do so at his own risk. Two builders once took a contract under a partnership arrangement, by which the profits were to

be divided. The partners disagreed, and one of them had to sue the other for his share. The defendant, in reckoning the profits, claimed credit for money paid as "gratuities" to the architects having charge of the work. The New York Court of Appeals held that "there was no proof that the payments were beneficial to the parties, or that they were necessary or justifiable on business principles"; and that the credits were properly rejected by the court below.

*Marsh vs.  
Masterton,  
101 N. Y. 401.*



## CHAPTER VII.

### THE ARCHITECT'S CLAIM TO COMPENSATION.

The Methods of Employing Architects.

**T**HE claim of the architect to compensation for his services depends, both as to the amount which he can collect, and the way in which it is to be collected, upon various circumstances. There are two distinct ways in which an architect may be employed. By the first, or usual method, he agrees, either in writing, or verbally, or by implication, to render certain services, consisting commonly in preparing drawings and specifications for the construction of a building, and supervising its erection; and his client, in return, also either in writing, or verbally, or by implication, promises to pay him for these services a definite sum, or, more commonly, a definite percentage on the cost of the structure. By the second method, the architect is employed, at a fixed salary, payable by the day, month, or year, to render certain professional services. This is the way in which city or corporation architects are usually engaged, and there is a very important difference between their relation to their employer and that of an architect working for a commission or fixed remuneration.

Salaried Architects.

To take up first the case of salaried architects; while their work may be the same as that of their brethren employed on commission, they have the advantage over them that they incur no responsibility for the consequences of their own carelessness or unskilfulness. We have seen that an architect paid by a fixed sum, or a percentage, may be required to make good, sometimes at a ruinous expense, any damage caused to his employer,

or to the public, by his own negligence or ignorance, or that of his assistants; but an architect, or other professional person, hired on a salary, is taken with all his imperfections on his head, and it is his employer, not himself, who must pay the bills for the consequences of any lack of skill or care on his part. If the person employed had made false statements as to his attainments and experience, in order to secure employment, it is possible that he might be made to pay for damage resulting from reliance on his false statements; but unless he has been guilty of these, his employer must content himself, no matter how disastrous may be the consequences of his mistakes, with discharging him, first paying him his salary in full up to the time of his discharge.

Even to discharge a servant, however, before the expiration of the term for which he is employed, inflicts upon him an injury, and unless such gross negligence can be proved against him as would, to a jury, seem to justify instant dismissal, he can recover damages for the wrong done him. What shall be the amount of those damages, and how they shall be collected, appears to be not quite settled in the courts.

One theory has been stated by an Alabama court, substantially as follows:

"Where one is employed on contract for personal services, for a particular term, at stipulated wages, if the person employed is discharged, without fault on his part, before the expiration of the term, he may either treat the contract as broken, and recover all damages sustained by him up to the time of the trial of the case, or he may treat the contract as continuing, and, holding himself ready to perform it, recover the entire wages due at the expiration of the term; and if wages were to be paid by instalments, may recover each instalment as it falls due."

On this theory, if a person is hired for a year, and is discharged without proper cause at the end of a month, he may either collect his pay for the month, with damages for injury to his reputation, etc., if he has suffered any, and thereafter

**The Wrongful Discharge of a Servant.**

*Elderton vs. Emmens*,  
6 O. B. 160, 187.

*Everson vs. Power*,  
89 N. Y. 527.

*Daniels vs. Newton*,  
114 Mass. 530-8.

**Two Theories of Damages. The First Theory.**

*Strauss vs. Murtief*,  
64 Alab. 299.

*Ewing vs. Directors*,  
2 Bradw. 458.

*Williams vs. Chic. Coal Co.*,  
60 Ill. 149.

*Fuller vs. Little*,  
61 Ill. 1.

*Jaffray vs. King*,  
34 Md. 217.

*Chiles vs. Belleville*,  
68 Ill. 123.

*Trustees vs.  
Schaffer.*  
63 Ill. 243.

*Sanger vs.  
Chicago.*  
66 Ill. 511.

*Mahon vs.  
Daly.*  
70 Ill. 653.

*Hamlin vs.  
Rae.*  
73 Ill. 422.

*Moore vs.  
Bennett.*  
40 Cal. 261.

have no claim on his late employer; or he may wait until the year is over, and then collect his wages for the whole time; or, if he was to receive his pay monthly, can bring separate suits at the end of every month for the wages then due; but he cannot sue in advance for wages which would become due to him later, and, if he wishes to collect the total sum due him for damages, which is the full year's wages, he must wait until the year has expired.

There are many cases which have been decided on this principle, and claims for damages have been rejected for no other reason than that they were prematurely brought, before the full amount of damages that would have become due later had accrued; but some courts hold quite a different rule.

#### **The Second Theory.**

*Balwin vs.  
Bennett.*  
4 Cal. 392.

*Crabtree vs.  
Hagersleigh.*  
26 Ill. 233.

*Blair vs.  
La Hire.*  
127 Mass. 518.

*Jaffray vs.  
King.*  
34 Md. 217.

This rule, which we may call the second theory, is stated by a California court in these words:—

"The general rule as to measure of damages in an action for a breach of contract is not the whole price agreed to be paid, but the actual loss sustained, which will consist of the value of the services rendered, and the damage sustained by the refusal to allow performance of the rest of the contract."

"But where, from the nature of the contract, . . . no possible mode is left for ascertaining the damage, . . . the measure of damages is the amount agreed to be paid."

Two important cases have also been decided on this theory in Maryland. A man named King was engaged by a New York dry-goods firm to act as its salesman in Baltimore, for a term to extend from February 9, 1869, to June 30, 1869, at a salary of \$350 a month. King entered on his duties, and discharged them without complaint, until he was dismissed, by a letter, dated May 8, 1869, on the alleged ground that he was attending to the business of another firm.

It was proved that his engagement was in these words: "we hereby engage your services as salesman," and the Supreme Court held that these words did not require King to give his whole time to the service of the firm; and that he was at liberty, if that service did not require his whole time, to occupy

the remainder in any other pursuit which was not inconsistent with his contract, and not injurious to the firm's interests, and which did not impair the value of his services to the firm as a salesman in that market.

The counsel for the firm claimed that the suit for the amount of the stipulated salary, as damages, was commenced before the expiration of the period of hiring; and that King had earned money subsequent to his discharge, and previous to June 30, in another employment, which ought to be offset against the damages claimed. In regard to the latter defence, the Supreme Court held that "The measure of damages was "fixed by the contract, — a given salary for a specified period, "— and King was entitled to recover his whole salary under "the contract, from May 1, the date to which he had been "paid, to June 30, inclusive; and the firm could not claim a "reduction therefrom of the amount which King earned subsequent to his discharge, and before June 30, in another "employment, having failed to show that he could not have "earned it, without a violation of his duty under the contract, "if he had not been discharged." As to the former claim, that the suit was prematurely instituted, the Supreme Court approved the instruction given to the jury in the court below; that the contract price was not recoverable *qua* salary, but as damages in the nature of compensation for the injury sustained by King at the hands of the firm.

In the second case, the plaintiff was hired for a certain length of time, with promise of a partnership at the end of that time, for a year certain. Before the expiration of the period of hiring, and before the time for taking him into partnership had arrived, the plaintiff was discharged, without good reason, and immediately brought suit for the balance of his wages, and the prospective profits of his year of partnership, as damages for his wrongful discharge. The defendant's counsel claimed that the suit was brought prematurely, as the time for the commencement of the partnership had not arrived; but the Supreme Court held that the plaintiff was not obliged to wait

Jaffray vs.  
King,  
34 Md. 217.

Dugan vs.  
Anderson,  
36 Md. 567.

for this, and quoted a famous English case, which was decided in 1852, and has ever since formed a precedent in English courts.

*Hochster vs.  
De La Tour,  
20 Eng.  
L. & F. R. 157.*

In this case, the plaintiff was a courier who was engaged by the defendant, in April, 1852, to serve him during a three-months' tour which he proposed to make on the Continent. The tour was not to commence until June 1, 1852, and the courier's services and pay were to begin at that time; his compensation being fixed at ten pounds a month. Soon after the arrangement was made, the defendant abandoned it, and told the courier that he should not take him. The courier then sued him for breach of the contract, and the suit was entered May 22, 1852. The jury awarded him twenty pounds as damages. The defendant appealed, his counsel claiming that no breach of the contract had taken place at the time of commencing the suit, as the time for beginning the service had not arrived. The Court of Queen's Bench, however, held that the plaintiff was entitled to bring action immediately upon the refusal to employ, and was not bound to wait until after the day agreed upon for the commencement of the service had arrived. In the discussion of the case, the court assimilated it to an action for breach of a contract of marriage. If a man should agree to marry a woman on a certain day, and, before the arrival of the day, should marry some one else, it has been decided that the first woman has a right of action for breach of the contract as soon as her intended bridegroom puts it out of his power to perform it, by marrying some one else; and that she is not obliged to wait for the appointed wedding-day before bringing suit. The counsel for the tourist objected that the breach of the contract with the courier was not final, as it would be in the case of the contract of marriage, because the defendant might, at any time before the first of June, have changed his mind, and concluded to take the courier with him, and the latter would then have had no cause of complaint; but the Court thought that this would only have made matters worse, as the courier would have been kept in suspense, and perhaps prevented from accepting another engagement.

A recent case in Massachusetts was decided in the same way as the English and the Maryland ones. Two men were hired to work until a given day, and, before the day arrived, were discharged. They sued for their wages until the expiration of the term for which they were engaged, but brought suit before the end of the term had arrived. Their complaint said that their claim was for "wages due," and the defendant argued that the suit was premature, and that the wages could not be due until the completion of the term of employment. The Supreme Court, however, held that the claim was simply "inartificially" stated in the complaint, and that the action was really for damages for the breach of the contract, and the right of action accrued as soon as the plaintiffs were discharged. It held, moreover, that the jury had a right, in estimating the damages, to take into account on one side the wages which the plaintiffs would have earned if they had not been wrongfully discharged.

On the whole, although there is such good precedent for supposing that a man employed at fixed wages for a specified term may, if he is discharged without good cause before the end of the term, recover his wages to the end of the contract term, even if he sues for them before the expiration of the term, it would, perhaps, be safer to wait until the time of the engagement has expired, taking care, meanwhile, to let it be well understood that the person discharged is ready and willing to resume his work, and is doing all he can to diminish the damages which he will be obliged to claim, if justice is not done him, by looking for other employment.

On either theory, in a suit for damages for wrongful discharge from employment, before the expiration of the time for which the plaintiff was hired, the defendant is entitled, if it is shown that the plaintiff earned money in some other employment during the time which elapsed between his discharge and the expiration of the term for which he was hired, to deduct the amount so earned from the damages which he may be required to pay. Moreover, the defendant is not only entitled

*Paige vs.  
Barrett,*  
151 Mass. 67.

*Dana vs.  
Short,*  
81 Ill. 468.

*Smith vs.  
Hayward,*  
7 A. & E. 544.

*Hartley vs.  
Harman,*  
11 A. & E. 798.

*Colburn vs.  
Woodworth,*  
31 Barb. 381.

*Gordon vs.  
Brewster,*  
7 Wis. 355.

*Howard vs.  
Daly,*  
61 N. Y. 382.

*Ruddock vs.  
Belton,*  
7 Bradw. 517.

**Wages  
Earned in  
Other Em-  
ployment to  
be Offset  
from Dam-  
ages.**

*Holloway vs.  
Talbot,*  
70 Ala. 339.

*Armfield vs.*  
Nash,  
31 Miss. 361.

*Hull vs.*  
Heightman,  
2 East. 145.

*Archard vs.*  
Horner,  
3 Car. & Payne,  
349.

*Thompson vs.*  
Wood,  
1 Hilton, 93.

*Fowler vs.*  
Armour,  
24 Alab. 199.

*Booge vs.*  
Pac. R. R.  
33 Mo. 212.

*Moody vs.*  
Leverich,  
4 Daly, 401.

*Gandell vs.*  
Pontigny,  
4 Camp. 375.

*Fewing vs.*  
Tiedall,  
1 Exch. R. 295.

*Cutter vs.*  
Powell,  
2 Sm. L. C. 48.

*Goodman vs.*  
Pocock,  
15 Q. B. 576.

*Clark vs.*  
Marsiglia,  
1 Denio. 317.

*Whitaker vs.*  
Sandifer,  
1 Duvall (Ky.)  
261.

*Chamberlain*  
*vs.*  
McAllister,  
6 Dana, 352.

to offset these earnings from the damages, but the plaintiff must show that he used reasonable diligence in trying to get another situation. The law does not allow him, after his wrongful discharge, to sit still, expecting to draw full pay, under the name of damages, from his late employer; he must bestir himself to find other work, and can collect only the difference between what he can earn as the result of such reasonable efforts and what he would have earned if he had not been wrongfully discharged.

These principles are of great importance to draughtsmen, as well as to salaried officials, so that it will be useful to explain them somewhat in detail.

Naturally, when suit is brought for damages for a breach of this sort of a contract for employment, the defendant's counsel does his best to convince the jury that the plaintiff had opportunities for other employment, which he ought to have availed himself of, and that the money which he might have so earned should be offset against the damages claimed; and if the jury are satisfied that the plaintiff has been remiss in looking for other work, they will only award him the difference between what they think he might have earned, if he had been reasonably active, and what his wages would have amounted to if he had kept his position; but the law puts the burden of proving that the plaintiff might have been earning money by other work on the defendant, and it must be shown that the employment which he might have had was of the same character as that in which he had been previously engaged. For example, a draughtsman, wrongfully discharged before the end of the time for which he was engaged, is not obliged, to save his late employer's money, to accept a situation as a dancing-master, however well qualified he may be personally to grace such a position; and proof that such a situation was offered him, and refused, will not be received in mitigation of the damages which will be awarded him for his dismissal, although, if he should have voluntarily taught dancing during his interval of rest from his regular professional work, the sums that he may

have earned by so doing will be offset from the verdict against his late employer.

*Stevens vs.  
Crane,  
37 Mo. App. 487.*

It is, however, the law that if the new employment was more difficult or laborious than the old one, the offset will not be the whole amount of the wages earned in it, but only such proportion of them as the jury may think fair and reasonable.

In any case, a person who wishes to hold another to strict compliance with the terms of a contract for employment must make sure that the terms are definite and well understood, and he must make it perfectly clear, if he should be dismissed without cause, that the parting was not by mutual agreement, and that he was always ready and willing to do the work for which he was employed, but was prevented without his consent.

**Person Employed must Keep to the Terms of Employment.**

This is a very important matter. If the jury can be convinced that the person employed refused or neglected to do his work, or threatened to leave of his own accord, and finally did so, they will certainly award him no damages for not being allowed to continue in an employment which he wished to leave, or in which he misconducted himself; and one who seeks redress for the wrongful termination of his employment should show in his complaint that he was ready and willing to render the services for which he was employed.

*Ruddock vs.  
Belton,  
7 Bradw. 527.*

In order to enforce a contract for employment, it must be more definite in its terms than is sometimes the case. A Minnesota man, A, once agreed with B that B should employ him as long as he, A, chose to stay. B, after a time, sent A away, and A brought suit for wrongful dismissal, but lost his case, the Supreme Court holding that the obligation violated was too uncertain to maintain a suit upon.

*Bolles vs.  
Sachs,  
37 Minn. 315.*

In another case, in Indiana, a man entered into a contract by which he was to be employed by another, but the terms of the employment were left blank in the agreement, and there was no stipulation in regard to filling the blanks.

*Atkins vs.  
Van Buren,  
77 Ind. 447.*

The party who was to be the employer failed to keep his agreement, and the other brought suit for the breach of the



*Atkins vs.  
Van Buren,  
77 Ind. 447.*

contract. The Supreme Court decided that the contract could not be made the basis of an action for failure to employ.

*People's Co.  
Ass'n. vs.  
Lloyd,  
77 Alab. 387.*

The person employed under an agreement as to wages and terms of service must himself keep to those terms, or he may be held to have waived them. Thus, if a draughtsman is employed for a year, at fifteen dollars a week, and, at the end of six months, his employer tells him that work is so dull that he can only afford to give him ten dollars a week for the future, and he consents, he cannot afterwards claim fifteen for the last six months of the year; but if he refuses to agree to the change, and protests, and makes it clear that he does not consent to any modification of the contract, he can enforce the original agreement. Moreover, after a man has agreed to pay a person certain wages for his work, he cannot afterwards refuse to pay them on the ground that the services were not worth so much. If no deception was practised on him as to the capacity or skill of his employé, and if the latter works diligently, and does the best he can, evidence that his work is not worth so much as was promised for it will not be received in court.

In certain cases, the law is kinder to the person employed than to the one who employs him, and the former may show that his services were worth more than the sum which he agreed to take for them. A man was once engaged to work as laborer on a city farm, for \$300 a year, for one year. He worked from April to October, drawing \$25 per month from the city treasury and was then discharged without cause.

He sued, treating the contract as having been rescinded, for \$10 per month extra for the time he had worked, on the ground that during the months from April to October, he could have earned \$35 per month, although during the winter months he might be obliged to take less. The counsel for the defendant claimed that his receipts for his wages at the end of each month precluded him from demanding more for those months, but the Supreme Court held that they did not have that effect, and that he was entitled to the extra amount claimed.

In this case, the plaintiff elected to abandon the contract, and sue on *quantum meruit* for what he had done up to the time of his discharge, at its actual value, independent of what the contract provided that he should be paid for it. By doing so, he lost the right to claim the contract as existing, and sue for damages for its breach, which would, under the usual rule, be the total of the wages promised, less what he might have earned after his discharge, before the end of the year. The law gives the person injured by wrongful discharge the option of adopting either course, as may seem most for his interest, but he must make his choice before his suit is brought, as he cannot unite the advantages of both methods.

So also, the person employed, if he wishes to take advantage of his contract, must keep it himself. It was decided in Massachusetts that a man who agreed to work a year at a fixed salary, and left of his own accord at the end of six months, could maintain no action for his wages for the six months during which he had worked, on the ground that the contract was for a definite amount of labor for a definite sum, and failure of one party to keep his agreement excused the other from his part of it.

It is fair to say that this doctrine in regard to contracts for employment is not accepted without question, or at least without close scrutiny, in some other States. Where the wages are to be paid at fixed intervals, of a week, or a month, although the contract of employment may be for a year, it is the tendency of courts to consider that it really meant that each week's or month's wages should be due at the expiration of the week or month, although the engagement might be that the person employed should stay for a year.

Even under the more severe view adopted in the Massachusetts case, it was claimed that the employer had made some promise that if his servant would stay and do a little additional work for him, he would pay him his wages for the preceding six months; and the court held that if such a promise was made, and the servant had rendered such additional service,

Isaacs vs.  
McAndrews,  
1 Mont. 437.

Rice vs.  
Dwight,  
2 Cush. 80.

however slight it might have been, and even if it had turned out to be of no use to the employer, the servant could maintain an action for his six months' pay.

**Servant  
Must Show  
Intelligence.**

*Wehrli vs.  
Rehwoldt,  
107 Ill. 60.*

Besides keeping his agreement in regard to services, the person employed, if he wishes to be always able to enforce his contract, must show a certain amount of intelligence and interest in his work. An architect was once employed to superintend the erection of a building. He might have known when the work of erection was commenced, but took no pains to inform himself; and the owner, finding his house going on without supervision, employed another architect to look after it. The first architect then sued for damages, on account of the breach of the contract with him, but the Supreme Court held that he had no claim.

**The Claim  
to Pay for  
Extra Work.**

It is not unusual in busy architects' offices for draughtsmen to work, on occasion, after hours, and the question is occasionally raised whether they have a legal right to claim extra pay for doing so.

*Voorhees vs.  
Combs,  
4 Vr. 484.*

The law appears to be that for extra services, voluntarily performed, of the same general sort as those of their regular employment, the persons employed cannot claim extra compensation, unless an express agreement has been made beforehand that such extra services shall be paid for. This is the principle laid down in a New Jersey case, where a claim was made for additional pay for extra services, performed during the illness of the employer, without promise on his part to give additional compensation for them.

## CHAPTER VIII.

### ARCHITECTS EMPLOYED ON COMMISSION.

**W**HERE an architect is employed in the more usual way, under an express or implied agreement to do certain work for a fixed price or commission, the rule for calculating the damages to which he is entitled, if deprived of his employment without cause, is simpler.

Like persons employed at fixed wages, he is entitled, in such a case, to treat the contract as rescinded by both parties, and sue, on *quantum meruit*, for the fair value of the labor which he has already expended; or he may consider the contract as broken by the other party, and, if his offers to go on and complete his part of it are rejected, may sue for damages for the breach of it; and the damages will usually be reckoned by the court at the full contract price or commission, less what he would have had to lay out for materials and draughtsmen's services; or, in other words, the profit that he would have made out of the transaction.

**Damages  
Full Commission,  
Less Expenses.**

Naturally, such cases in which architects are concerned are not very common, and there appear to be none mentioned in the American courts of record. A suit, in which Messrs. Fuller & Wheeler, of Albany, were plaintiffs, was, however, decided by a referee in exactly this way, and the rule seems to be general in regard to contracts for other sorts of personal service. A lawyer was engaged to defend certain suits at an agreed price, and was discharged from his employment without cause before the suits were concluded. He had fully performed

**Webb vs.  
Trescott,  
76 Cal. 621.**

his agreement until the time of his discharge. In his suit for damages for the breach of the contract of employment, the Supreme Court of California ruled that the measure of damages was the full amount agreed to be paid.

**What is In-  
cluded in the  
Architect's  
Service.**

There is occasionally a doubt as to what is included in the service which the architect is to render, the architect thinking that he ought to have extra pay for certain work which he has done at the owner's request or suggestion, and the owner thinking otherwise. In most cases this would be a question for the jury, who would have to decide from the evidence what the contract of employment really comprised; but the decision occasionally turns upon a point of law or custom, which must be decided by the court.

**Dull vs.  
Bramhall,  
43 Ill. 364.**

When the tunnel for supplying the city of Chicago with water was built out into Lake Michigan, the contractors for the work, Messrs. Dull & Gowan, employed a Pennsylvania carpenter, named Bramhall, to superintend the construction of the crib, which was afterwards to be taken out into the lake and sunk at the end of the tunnel. At the conclusion of operations in the autumn Bramhall went to work in a reaper-factory, and Dull & Gowan asked him to devise some plan for launching the crib the following season, and for sinking the two iron cylinders which were to be placed at the lake end of the tunnel. No plans for doing this part of the work had been provided by the city, but several schemes were prepared by different parties, and submitted to the contractors and the city engineer. Bramhall made his plans in the evenings, after his work in the reaper-factory was over, and they were adopted. When he heard that they had been adopted, he made in his book a charge of \$500 apiece for them. In the spring, Bramhall was persuaded to leave his place in the reaper-factory and superintend the launching of the crib and the sinking of the cylinders; and he also, at the request of the contractors, devised in his evenings a scheme for anchoring the crib in position. He remarked to Gowan that he had made a charge for his plans, and both Dull and Gowan told him that he should be paid "well"

or "something" for them. After the work had been successfully accomplished in accordance with his scheme, he agreed with the contractors to take \$200 as payment for his plans, and Gowan promised to pay it, but failed to do so. Bramhall then sued for compensation, and Dull & Gowan resisted the claim, on the ground that the making of the plans was included in the services which Bramhall was to render under his agreement for superintendence. The jury in the court below gave Bramhall a verdict for \$650, and the Supreme Court sustained the verdict, saying that Bramhall "worthily earned the 'pittance the jury gave him,' and that 'there was no doubt that it was extra work.'"

A decision is sometimes quoted to show who is the person regarded by the law as the proper one to pay for the plans of a building. An architect named Webb was requested by one Harper to make a design for a portico. Harper contracted with School, a carpenter, to build the portico according to the design of Webb, and in accordance with his working drawings. When the portico was finished, Webb asked Harper for compensation for the working drawings, as well as for the design; but Harper paid him for the design, and refused to pay anything more, saying that the working drawings formed no part of the contract between them. Webb then sued for payment for them from the contractor, on the ground that, if Harper was not bound to pay for them, School, who used them, was. The report goes on to say: "But the defendant (School) was not shown to have made any prior request or subsequent promise, and the presumption, which might have arisen from the use of the drawings in the execution of the work, was rebutted by proof that the architect usually furnishes the means of carrying his plans into execution by designing the details as well as the general outline, and that the obligation of paying for the whole ordinarily rests on the employer."

Where the architect's compensation is to be reckoned by a percentage on the cost, an attempt is sometimes made to cheat him out of his pay by concealing or falsely stating to him the

**Drawings  
not included  
in Superin-  
tendence.**

**Plans Paid  
for by Owner.**

**Webb vs.  
School,  
3 Phila. 126.**

**Owner must  
State Cost of  
Building for  
Computing  
Commission.**

**Lambert vs.  
Sanford,  
55 Conn. 457.**

cost of the building. Courts, however, will not suffer such evasions, and an owner in England is said to have been compelled to bring his books into court, that the judge might reckon up the cost. In an American case, an architect named Lambert agreed with one Sanford to make plans and specifications, and procure bids, for a block of three houses, for two and one-half per cent on the estimated cost. He made preliminary sketches, and submitted them to Sanford. Sanford examined them, and told Lambert to go on and prepare a full set of drawings and specifications, which he did, making separate specifications for the mason-work, carpenter-work and plumbing. Sanford then told him to submit the plans and specifications to responsible masons and carpenters, and get bids, which was done. The bids were opened, by Sanford's direction, and in his presence, and amounted to \$8,800. Sanford afterwards concluded not to build that season, and so informed Lambert, but did not accept or reject the bids, or direct others to be procured. Lambert sued for his pay, and Sanford allowed the case to go by default, but appeared to have the claim of Lambert reduced, saying that he only agreed to pay two and one-half per cent on the actual cost of the buildings when completed, and that, if he concluded not to build, he was only to take the plans and specifications and pay a reasonable sum for them. The court rejected evidence of this, saying that it was shut out by the default, which was an admission of the contract as set forth in the complaint.

Sanford then claimed that the estimate intended by his contract with Lambert must be agreed to by both parties; that the bids were not estimates, and had not been accepted, and that no estimate had therefore been made, and there was nothing to show that the two and one-half per cent was due, or when it was to become due.

**"Estimated  
Cost" Means  
Reasonable  
Cost.**

The Supreme Court held that "estimated cost" meant reasonable cost; not necessarily the amount of some actual estimate made by a builder, nor an estimate agreed to by the parties, nor one accepted by the owner; and that the court

below had properly decided the case, on suitable evidence as to the cost.

Where no stipulation has been made beforehand as to the definite sum or percentage which shall be paid for the architect's services, it is usually supposed by architects that they are entitled to collect compensation according to the schedule of the American Institute of Architects, or that there will, in general, be no difficulty in obtaining a verdict for the five per cent on the cost which is accepted by architects in all civilized countries, and by the public in most, as the proper and reasonable compensation for the architect's services upon such buildings as those which generally come under his charge.

It is true that the higher courts do not often quarrel with the amount of the fees which the architect claims under the schedule, but they often object to the introduction of the schedule itself, or to any evidence in relation to the custom of regulating the charges of architects by any sort of percentage. One English judge is said to have refused to hear evidence as to the five per cent rule, on the ground that a custom, to be of any authority in law, must be a reasonable one, and this was not a reasonable one. A more sensible objection is that a custom, to be binding between two parties, ought to be known to both parties, and the public generally knows little of the rules which bodies of architects establish among themselves; but an obstacle of the same sort does not seem to prevent real estate brokers from collecting their regular commissions without difficulty, and the legal mind appears, as is shown by the remarks sometimes made in court on the subject, to be unfavorably impressed by a custom which, as the lawyers assert, makes it for the interest of the architect to have his employer's building cost as much as possible. Probably this circumstance never enters the head of most architects; but lawyers are not remarkable for looking on the bright side of human nature.

The consequence is that architects who are compelled to collect their pay at law should be cautious about having the schedule, or any custom or usage of charging by percentage,

**The Five  
Per Cent  
Rule.**

**Schedule  
Fees Reasonable in  
Amount.**

**Inslee vs.  
Jones,  
Bright, 76. (Pa.)**

**Schedule, as  
Evidence of  
Custom, not  
Favored in  
Courts.**



*Knight vs.*  
*Norris,*  
13 Minn. 473.

*Gilman vs.*  
*Stevens,*  
54 N. Y. P. R.  
197.

*Irving vs.*  
*Morrison,*  
37 C. P. (Up-  
per Canada)  
242.

**Schedule**  
**Valid Where**  
**Known to**  
**Client.**

**What No-**  
**tice Necess-**  
**ary.**

mentioned in court. Occasionally, judges are found who will rule, like those of the Supreme Court of Minnesota, that a charge of five per cent on the cost, for full service, "would seem to be customary and reasonable"; but there is always some risk that the custom itself may be held to be unreasonable, or not binding on the other party, and that evidence in relation to it may be excluded; and the opposing counsel may be relied upon to expatiate on the folly and wickedness of an alleged custom which enables the architect to fill his pocket by the ruin of his client.

Where, however, it can be proved that the client knew, or had reason to know, that the charge would be five per cent on the cost, and made no objection, the case is quite different, and he will be regarded as having agreed to pay on that basis, however unreasonable the basis may seem to his lawyer. How much notice to the client is necessary to satisfy the judges that he knew and assented to such terms is uncertain, and no case which establishes definite principles in regard to architects has yet been decided. In the case of *Gilman vs. Stevens*, previously quoted (page 45), the Institute schedule was read in court, and not objected to; and the judge charged that Mrs. Stevens knew the standard and regular rates of architects' fees, because it appeared that she had been charged the same rates by Mr. Gilman on several previous occasions.

In default of such clear evidence of knowledge of the custom as this, it is probable that if the architect, as many architects do, had the Institute schedule printed at the top of his sheets of letter-paper, and his client, after receiving several letters in relation to his building, written on this paper, had made no objection to the terms, a court would hold that the client knew the terms, and had tacitly agreed to them, and could not escape from paying in accordance with them.

Where the architect simply had them framed and hung up in his office in a conspicuous position, it seems to be more doubtful whether a client, if he denied having read them, would be held to have necessarily a knowledge of them. It is

true that this is all the notice that real-estate agents usually give to their customers in regard to their charges, but the usages of architects seem to be regarded as less reasonable in themselves, and, therefore, as requiring stronger evidence in their favor than those of the real-estate brokers.

It is to be observed that the custom of architects, as shown by the Institute schedule, where it is admitted at all, is nearly as valid in favor of architects who do not belong to the professional body issuing the schedule as of those who do. Membership in the Institute would imply a high grade of professional attainment, and a person who proved his membership might expect to recover remuneration on the highest scale if the jury thought that any classification ought to be made among architects in this particular; but, although a professional association has power over its members, and can, as is said to be done in Germany, expel those who do not conform to the schedule of charges it has adopted, it has no power over the public, and its schedule has no authority, as against the public, except so far as it represents the reasonable and customary charges of all skilful architects. In the case of *Gilman vs. Stevens*, although the Institute schedule was read, no attempt was made to show that Mr. Gilman was a member of the Institute; and the fact, except as indicating his professional standing, would have been quite immaterial.

A charge by percentage for partial service, on the basis of the Institute schedule, appears to be more difficult to commend to judges and juries than the five per cent for full service. One reason for this is, perhaps, that estimates made in the embryo stage of the proceedings relating to the construction of a building are of a rather vague character; and another may be that the amount of work done under the name of "preliminary sketches" varies greatly with circumstances. In a Michigan case, a firm of architects sued for compensation for services in preparing drawings for a proposed building, and, in the court of first instance, recovered a verdict for one per cent on the cost of the intended building, that being the schedule

**Schedule  
Usages Valid  
for Non-  
Members of  
the Institute.**

**Schedule  
Fees for Par-  
tial Service.**

**Scott vs.  
Maier,  
56 Mich. 514.**

Scott vs.  
Maier,  
56 Mich. 514.

fee for "preliminary sketches." The suit was brought before any set of plans and specifications had been completed, and before the owner had decided in what style and manner he would build, and how much money he would put into the building. The architects made floor plans and one elevation, and sent them to the owner, who returned them, saying that he declined them, and would send for the architects if he should want their further services. One of the architects testified that he left the sketches with the defendant "for approval," and that they were returned "not approved"; but the jury seems to have been convinced that the architects were really employed by the plaintiff, and that the plans were not volunteered. While the elevation was being prepared, Wood, the acting man of the architects, met the defendant, Maier, in the street, and Maier asked him how much "that building would cost." Wood replied that he could not tell without calculating, but that this could be done very nearly. While the elevation was in the draughtsman's hands, Wood and one of the Scotts figured that the building would cost about \$17,000. Maier said he could get it done for \$12,000, and Wood said he could not. Maier criticised the cornice as being too showy, but Wood said it was not. This was the last that occurred before the drawings were sent back.

The architects sent Maier a bill, as follows:

"To services rendered as architects and preparing preliminary drawings for trunk-factory, and making estimates of cost of same, being one per cent of estimate of \$17,000 — \$170."

The verdict in the court below was for the amount of the bill, but Maier appealed to the Supreme Court, which took a different view of the matter. The judges of the Supreme Court, in their decision, said: "There is some conflict in the testimony upon various matters, but in the view we take it is not important to consider it in detail. There was testimony that Maier was told that the architects' charges would be two and one-half per cent on the contract for plans, specifications and superintendence of the building, and that he

"regarded such terms as fair. There is no testimony that  
"he was given any other information about the expense of  
"preliminary work, and the plaintiffs' testimony is clear that  
"he never had any of the elements of the estimate beyond the  
"gross sum of \$17,000. It does not appear that any instruc-  
"tions were ever given, or any conclusions arrived at, as to  
"the kind or quality, or the details of building materials and  
"other articles, beyond such general talk and instructions as  
"were had upon the preliminaries.

"The plaintiffs' theory, without which they could not have  
"recovered as they did, seems to have been that, by employ-  
"ing an architect to make drawings which are not finally  
"determined on, and asking his opinion of probable cost, the  
"employer is bound to pay a percentage on a building such as  
"the architect sees fit to figure out, and at a price which he  
"puts upon its probable cost.

"This seems to us an idea which has no foundation in law  
"or common-sense, and, unless such a basis of compensation  
"was specifically agreed upon, it cannot be allowed.

"There is some reason for claiming that, if a man is  
"employed to make preliminary sketches to enable a land-  
"owner to determine what sort of building he may profitably  
"erect, and in what style and of what material it should be  
"built, he should not do the work without reward, provided  
"such is the understanding. If, however, as the defendant  
"here claimed, the architect volunteered his services, with the  
"chances of future employment, it would be different.

"But it cannot be held that in either case such preliminary  
"work can be measured by estimates of the cost of the archi-  
"tect's projected building. . . . It would always be for an  
"architect's interest, in such a case as this, if the plaintiffs  
"are correct, to make the plan as expensive as possible,  
"instead of bringing it within bounds. . . . The only claim  
"the plaintiffs could have would be for so much time as was  
"actually spent on their work, with the fair understanding  
"that they should be paid for as much as they did, or with

Scott vs.  
Maier,  
56 Mich. 514.

*Scott vs.  
Maier.  
56 Mich. 514.*

"such circumstances as would compel the defendant to the duty of so understanding; but no custom of architects can be received to fix it on any such basis as is here set up. . . . Such a custom, if it prevails, can bind no one who is not made in some way aware of and assenting to it. It is too unreasonable to stand alone. It would put every employer at the mercy of an architect's extravagance in taste and license of guessing at estimates which have nothing to measure them. It cannot be said that the testimony introduced had any lawful tendency to prove the value of the plaintiffs' work, and the absence of any other kind of evidence would not make this appropriate."

The judgment of the court below was reversed.

*Question of  
Schedule  
Custom to be  
Raised With  
Caution.*

In this case, the plaintiffs made a mistake in saying anything about percentages in their bill. Unless it had been agreed upon beforehand that they were to be paid by a percentage on the cost, it would have been much better for them, as it is in general for all architects under similar circumstances, not to raise the question of percentages, or Institute schedules, or the customs of architects, but simply to send a bill for \$170, and let the defendant try to prove it unreasonable. It is unlikely that any witnesses whose opinion was entitled to respect would have thought that \$170 was too much for a firm of architects, who kept a managing foreman as well as draughtsmen, to charge for sketches for a seventeen-thousand-dollar building; and, even if the defendant had overwhelmed the jury with witnesses who thought that two dollars a day was high pay for an architect, the result would only have been the cutting-down of the verdict, instead of its reversal.

*Value of  
Time-Book.*

In the present state of the law, in this country, every architect should keep a time-book, and say as little in court about schedules or percentages as possible, unless he has agreed with his client about them beforehand. Of course, he can make out his bill in accordance with them as to the amount charged, and any architect will testify that the amount is reasonable; but the process of arriving at it, although known to architects

as the most ready and satisfactory approximation, is apt, as in this instance, to excite the sensibilities of courts, and is best kept out of the testimony. There is no need of exhibiting it, as the results, which are the important part, generally meet with the approval of judges and juries, if nothing is said about the way in which they are obtained. If, as often happens, the Court wishes to know how the architect arrived at the amount of his charge, the time-book will be of great service in showing that something besides mere arbitrary custom was available for fixing the bill at a reasonable sum. In point of fact, the schedule rates often work in favor of the owner, instead of the architect. It frequently happens, particularly in the case of dwelling-houses for fussy clients, that the architect's actual outlay, in pay of draughtsmen and a suitable share of office expenses, is more than the five per cent on the cost which he feels himself held to as the limit of his charge.

**Schedule  
Rates Often  
Favor Client.**

In such a case; there is absolutely no reason, in this country, why the architect should not send in a bill for a lump sum, in excess of the schedule rate. Other architects, knowing the circumstances, would testify that the charge was reasonable, and the time-book would show that it was only fairly remunerative. The opposing counsel, having no other defence to make, would probably wake suddenly to the sacredness and universal prevalence of the schedule rates; and if the court should be persuaded to find, against the architect, that these rates were reasonable and customary, it could not very well refuse to find that they were equally so in subsequent cases, where it was for the interest of the architect to have the custom regarded as established.

It is not impossible that a judge might find a reasonableness in the schedule, if it could be used to cut down an architect's bill, which he would be unable to discover if it should be invoked in an architect's favor. We have already mentioned some of the experiences of Mr. Tilley, as the winner of the competition for the Chicago City-Hall. (Page 23.) After the earlier differences had been adjusted, Mr. Tilley was

**Chicago vs.  
Tilley.  
13 Otto. 146.**

Chicago vs.  
Tilley,  
13 Otto, 116.

appointed by the city of Chicago as the architect of the city's half of the combined court-house and city-hall which it was intended to erect, while the county authorities appointed Mr. Egan architect of their part.

**Fee for Partial Service  
Based on  
Agreed Fee  
for Full Service.**

The architects were directed to prepare plans for their respective halves of the building, and, not unnaturally, when the two plans were done, and compared together, they failed to make a harmonious whole. The architects were then instructed to make compromise plans, which would fit together, and were directed to have them ready on a certain day. Mr. Egan had his ready at the appointed time, but Mr. Tilley did not. However, he finished them, and showed them afterwards at a joint meeting of the city and county officials, and the city council ordered them to be adopted. Some months afterward, when the city council determined to proceed with the construction of its half of the building, Tilley offered his services as architect, but they were refused. He then sued the city for his pay, and the city resisted, on the ground that he had not obtained the assent of the county commissioners to his plan. The court held that his contract with the city did not contemplate that he should procure the assent of the county commissioners to his plans, and that he was entitled to recover compensation for the work actually done.

What that compensation should be, was the next point to be decided. Tilley had agreed to furnish all the plans and specifications for the city's half of the building, and superintend the erection, for \$37,500, which was three per cent on the estimated cost.

On the refusal of the city to employ him further, he brought suit on claims as follows: For services in preparing plans for the city's half of the building, \$25,000, or 2 per cent on the estimated cost; for making the second set of plans, "with specifications and diagrams," \$42,500, which seems to have been intended for 3 1-2 per cent on the cost. To these items was added another, of \$42,500, "for superintending the building of the new city-hall." The total was thus \$110,000.

There would be a certain color of authority for these charges in the Institute schedule, but the judge charged the jury that their award for partial service must be based on the contract price for full service; and Mr. Tilley, having charged for partial service more than he had agreed to accept for full service, was obliged to see his bill reduced to his own standard; the jury awarding him \$13,000.

*Chicago vs.  
Tilley,  
13 Otto, 146.*

Architects, seeing the terror which the prospect of mechanics' liens usually inspires in owners, and the ease with which builders, armed with this weapon, collect their pay, often inquire whether the same instrument cannot be made available for their benefit. At present, the law on the subject must be considered as undecided, decisions varying in different States; but the tendency appears to be toward excluding architects from the privileges given by the statutes to workmen.

*The Right  
of Architects  
to Mechanics'  
Liens.*

The case which is most frequently cited on the subject is that of the Bank of Pennsylvania *vs.* Gries. Gries had a written contract with the bank "to make all designs, plans and drawings for the said buildings and their furniture; to fully explain to and direct the execution of the same by the various mechanics employed by the party of the first part therefor; to draw up specifications, contracts and agreements of and for each and every part of said work; in connection with the superintendent to be appointed by the party of the first part to superintend these works, examining the progress of the same, and the materials provided therefor; and to report their conformity with the requirements of the drawings and specifications to the appointed authority of the party of the first part whenever required; to advise with the same in contracting for any part or portion of the work and materials; to examine all accounts connected therewith, and countersign all orders for payment of moneys thereupon; and in all duties and privileges to have full authority as architect."

*Bank vs.  
Gries,  
38 Penn. 423.*

The sum to be paid the architect for his services was \$3,500. Before the completion of the building, the bank officials notified Gries to stop the further progress of the work, and imme-



*Bank vs.*  
*Gries,*  
35 Penn. 243.

diately afterwards he filed a lien against the building for his services.

The judge in the court below instructed the jury to find for the plaintiff, for the full amount of his claim, and instructed them also that he was entitled to a lien under the statute; and the Supreme Court afterwards affirmed the decision on both points.

This case would seem to fix the law in Pennsylvania plainly enough, but later decisions in that State make extensive exceptions to its authority. In two cases where the architect made drawings and specifications only, and in another, where he made plans and specifications for the owner, but superintended only for the builder, the Supreme Court of Pennsylvania held that he was not entitled to a lien for his work; saying, in regard to the case of *Bank vs. Gries*, when that was cited in the architect's favor, that in *Bank vs. Gries* the architect "occupied the place of a mere builder." Architects, in reading the contract between Gries and the bank, will be unable to agree with the Supreme Court in this idea, but it will be remembered that it is the courts, and not the architects, who make the law.

*Price vs.*  
*Kirk,*  
90 Penn. St. 47.

*R. E. Co. vs.*  
*Lauffer,*  
84 Penn. St. 168.

*Rush vs.*  
*Able,*  
90 Penn. St. 153.

In New Jersey, where an architect furnished plans, specifications and superintendence for 2 1-2 per cent on the cost, which was agreed upon at \$75,000, he was held to be entitled to a mechanic's lien for his pay.

*Mutual vs.*  
*Rowand,*  
26 N. J. Eq. 389.

*Stryker vs.*  
*Cassidy,*  
76 N. Y. 50.

*Hubert vs.*  
*Aitken,*  
15 Daly, 237.

In New York, it has been held, in a case where an architect sought to enforce a lien for his work, that "the statute of 1862 includes all persons who perform labor, . . . irrespective of the grade of their employment, or the particular kind of service"; and in *Hubert vs. Aitken*, quoted above (Page 46), where the architects had filed a lien for their claim, no question was raised in regard to it, and the lien was ordered to be enforced for the amount of the judgment.

*Taylor vs.*  
*Gledorff,*  
74 Ill. 369.

In Illinois, a distinction is made between architects who draw plans for a building only, and those who superintend its erection; and the latter, who more positively perform work "in or about the building," are held to be entitled to a lien.

In Louisiana and Minnesota, all the architect's service, including drawing plans as well as superintending, is regarded as work on the building, within the meaning of the statute, and the architect is held to be entitled to a lien, even if he does not superintend. The Minnesota case, which involves several other important principles, is worth quoting. One Knight was employed as architect by McCargar, to make plans and specifications, and superintend the erection of a block. He made two designs; McCargar chose one, and said, "Go ahead with that as fast as you can." No price for the architect's services was agreed upon, but the implied agreement was, of course, that he should receive what they were reasonably worth. When the building was built up to the cornice, work was suspended for several months, and Knight filed a lien for his services. It was claimed by the defendant, who appears to have been a mortgagee, who had foreclosed after the suspension of operations, and who found the estate encumbered with the architect's lien:

*Mulligan vs.  
Mulligan,  
18 La. Ann. 30.*

*Knight vs.  
Norris,  
13 Minn. 473.*

1. That Knight was not entitled to a mechanic's lien under the statute.
2. That Knight's contract was entire, and that he was not entitled to file a lien before the building was completed and his work finished.
3. That the evidence that Knight superintended the building was insufficient.
4. That the item of labor was insufficiently described in the lien filed.

Knight's description of his claim was as follows:

For "plans, specifications and superintendence of building, at five per cent on estimated cost (\$38,780) = \$1,939."

The claim was referred to an auditor, who found the plaintiff to be entitled to \$2,071.72. This appears to have been the amount of the claim, with interest.

In answer to the defendant's objections, the Supreme Court held:

*Knight vs.  
Norris,  
13 Minn. 473.*

1. That the architect was entitled to a mechanic's lien under the statute; one judge dissenting.

2. That the suspension of the work was not due to the fault of the architect; that his plans and specifications were all done, and he had computed his claim only with reference to the cost of the building to the time of suspension of operations, exclusive of what remained to be done on it; and that suspension, without fault on his part, should not deprive him of his lien.

3. That evidence showed that Knight "came along three times a day most every day," and "stayed ten or fifteen minutes when he came, usually a quarter of an hour or less," and that McCargar told the carpenter to go to Mr. Knight if he wanted any information, and that this "had a considerable tendency to establish the charge for superintending."

4. That, "from the character of the labor (plans, specifications and superintending of building), it could not be expected that it would be itemized so as to give the hours and fractions of hours during which the services were being performed. This was in reality but one item. The charge, as made, would seem to be customary and reasonable in the gross. We think the account sufficiently specific."

It will be observed that the Minnesota Supreme Court thinks that a charge of five per cent on the estimated cost of a block, where no agreement has been made as to the architect's compensation, is "customary and reasonable"; and this decision may be taken as establishing the law that the five per cent clause of the Institute schedule, at least, will be admitted in Minnesota as legal and customary.

It will be observed that the architect's bill was calculated on the cost of the block up to the time when work on it was stopped, and it may seem strange that a claim was not made for the full five per cent commission on the estimated cost of the completed work, to which the architect appears to have been fairly entitled, under the rule that if a person is ready and willing to complete the work for which he is engaged, and is prevented from doing so, without his fault, by the other party to the agree-

ment, he is entitled to recover the full contract price, less his probable outlay for completing it, which, in this case, would be nothing, as the plans and drawings were done, and he would have had nothing but a few more personal visits of superintendence to make. The explanation appears to be that, under the statute, a mechanic's lien could be enforced only for work actually done, not for damages or future profits.

Cases will be mentioned below in which the liens of builders have been declared invalid, and their remedy lost, on account of their having entered claims for a larger amount than that actually due; and Mr. Knight's counsel seems to have been careful enough to see that his client did not endanger his suit by making his claim too extensive.

In Missouri, Kentucky and Maine an architect is not entitled to a lien, even if he superintends the building. The Missouri Court of Appeals says that "It seems clear enough that 'an architect is not a mechanic, . . . and that he cannot be said 'to perform any work or labor on a building when he draws 'or designs the plans according to which it is constructed.'"

In Maine, it has been held that "The statute plainly does 'not include men of the learned professions." In this case the architect superintended the building, as he did also in the Kentucky case in which he was held not to be entitled to a lien.

In New York, a decision has been given denying the right of the architect to a lien, which seems to be in direct contradiction to the decision of the Court of Appeals in *Stryker vs. Cassidy*; but, as the statute of New York in regard to mechanics' liens has been greatly modified since these decisions were given, it is impossible to say what might be the opinion of the judges in another case. In fact, as the statutes regulating liens are constantly being modified in the different States, and the words describing the persons who shall be entitled to liens are quite liable to be changed, a decision under the statute is of value as a precedent only so long as the statute remains unaltered; and architects should use great caution in availing themselves of such enactments.

**Limit of  
Claim in Me-  
chanic's  
Lien.**

**Raeder vs.  
Bensberg,  
6 Mo. App. 445.**

**Ames vs.  
Dyer,  
41 Me. 397.**

**Fonshee vs.  
Grigsby,  
12 Bush. 76.**

**Ericsson vs.  
Brown,  
38 Barb. 391.**

## CHAPTER IX.

### THE SICKNESS OR DEATH OF THE ARCHITECT.

**Architect's  
Contract a  
Personal  
One.**

*Stubbs vs.  
Holywell R'y  
Company.  
36 L. J. Ex. 166.*

**Architect's  
Contract En-  
tire.**

**Partial  
Compensa-  
tion Recover-  
able in Case  
of Death.**

*Dryer vs.  
Lewis,  
57 Ala. 550.*

*Ryan vs.  
Dayton,  
25 Conn. 188.*

**T**HE architect's contract with the owner for professional services is, unless some express stipulation is made to the contrary, a personal one; that is, the performance of it involves the personal skill and judgment of the architect himself, and cannot be undertaken for him by an assignee, in case of his bankruptcy, or by his executors or administrators in case of his death, or assigned by him to any one else, without the owner's consent. As the rule of law is that, in case of an entire contract, for a certain amount of goods or services, at a fixed price, no part of the price is due, unless the whole of the goods are delivered, or the entire service rendered, and as the architect's contract with the owner is held to be an entire one, his family, in case of his death or disability, would be unable to collect any compensation for what he had done on unfinished buildings, were it not for a special exception, which is made by statute in some States, and by the common law, at present, in all, under which, "where full performance of contract for personal services is prevented by the death of the servant during the term of service, the personal representative is entitled to recover rateable compensation for services actually rendered." This is the language of an Alabama decision; and the Supreme Court of Connecticut says, to the same effect, "Where the service is personal, and cannot be performed by the agency of any other person, there is an implied condition in the contract of service that the party hired is not deprived, by

"inability to labor during a part of the stipulated time, of the  
"right to a reasonable compensation for the services actually  
"performed."

The Court of Appeals of New York states the law even more clearly. "Where," it says, "a contract contemplates the  
"personal services of the party employed, and he contracts to  
"do the work for a definite period, and enters upon and continues in its faithful performance until prevented by his death,  
"or other cause, without fault on his part, from completing it,  
"and the employer has received actual benefit from the service  
"rendered, the representative of the party may recover from  
"the employer for the services rendered. The rule that,  
"when the contract is entire, full performance must be shown,  
"or there can be no recovery, applies only where the party  
"employed is to blame for the non-performance."

In another New York case, where the employer tried to show that the service which had been partially performed was not worth as much as he had agreed to pay for it, the court held that "the compensation in such cases is not confined to  
"*quantum meruit*, but is measured by the contract in proportion to the time performed."

The highest courts of several other States have maintained the same doctrine; and in a case where sickness, not death, was the cause of the suspension of the servant's labors, it has been held that the same rule applied.

In certain instances, however, the cessation of proceedings may cause prejudice to the employer's interests, and in such cases it has been held that he is entitled to set off the damage he has sustained from what he would otherwise be obliged to pay the representatives of the deceased. It is therefore prudent for the executors or administrators of a deceased architect to see that the work on hand in the office is promptly wound up to the satisfaction of the various clients.

*Wolfe vs.  
Howes,*  
20 N. Y. 197.

*Clark vs.  
Gilbert,*  
26 N. Y. 279.

*Cole vs.  
Smith,*  
4 Ind. 79.

*Allen vs.  
McKibbin,*  
5 Mich. 449.

*Faby vs.  
North,*  
19 Barb. 341.

*Patrick vs.  
Putnam,*  
27 Vt. 759.

## CHAPTER X.

### THE OWNERSHIP OF PLANS.

**The Schedule Clause as to Ownership of Drawings.**

**T**HE schedule of the American Institute of Architects contains a clause which says that "Drawings, as instruments of service, are the property of the architect." Although this clause expresses what architects, without exception, believe to be the natural and proper arrangement, it finds little sanction in courts. Why an architect's drawings should be regarded in any different light from a physician's note-books, or a lawyer's abstracts of title, or any of the other records and illustrations which professional men make to facilitate their service to their clients, and keep for their clients' benefit as much as for their own, is a mystery, yet they are unquestionably so regarded. Whether an engineer's plans and note-books, which he uses for the benefit of his clients in the same way that an architect does his drawings, and of which, like the architect, he furnishes, as a rule, only tracings, would be regarded as the property of the engineer or the owner seems uncertain, and there appears to be no recorded case in which the question has been raised; but architects' drawings are more available for laymen's use, and occasionally form the subject of a struggle in the courts, which usually ends unfavorably for the architect.

These struggles, unfortunately, perhaps, for the architects, take place generally in the inferior courts, and there does not appear to be a single decision of a court of record in the United States or in England on the subject.

One celebrated case was, however, argued before the highest court in England, and, although it was settled before a formal decision was given, and, therefore, does not appear on the records, the justice who first heard it, Baron Bramwell, expressed a strong personal opinion. This was the case of the British Government against the heirs of Sir Charles Barry, the architect of the Parliament House. After the death of the great architect, the Government desired to obtain possession of the plans of the building. The heirs resisted, on the ground that it was the universal custom that drawings, as instruments of service, should belong to the architect who made them. When evidence of this usage was offered to Baron Bramwell, he is said to have exclaimed: "I will not hear of it, that a man shall not have what he has paid for!"

**The Case of  
the Draw-  
ings for the  
House of  
Parliament.**

There is, perhaps, an observation to be made on this remark, that it was the judge who said that the owner had paid for the plans, while the Barry heirs said that he had not, but only for the use of them; and the judge refused to hear their evidence, and decided the case on his own, which was derived entirely from his imagination; but this appears to be a common practice in English courts.

At the time, this case was much discussed among architects and by the public, and the irresponsible opinion of a single judge has, perhaps, acquired in consequence more authority than he would himself have claimed for it.

However, in France, where several such cases have been decided, the highest courts usually hold that the owner is entitled to the drawings. In one case, the Court of Paris decided that the architect had a right to retain the plans until he had been entirely paid, which is regarded as implying the contrary—that when he had been entirely paid he must give them up.

**The French  
Law.**

Dalloz,  
1871, 2, 83.

In 1848, the Court of Bordeaux rendered a decision saying that, "In the absence of any agreement establishing, for the benefit of the architect, a fixed price for the execution of the building, and a second price for making the plans, custom

Dalloz,  
1849, 2, 171.



Dallos,  
1849, 2, 171.

and equity decide that the owner of the thing constructed, when he has paid the constructor, is also the owner of the plans which have served for its construction."

In this case the author of the drawings was an engineer, but, being plans for the erection of a building — to be used as a factory — it may be supposed that he was regarded as virtually an architect.

There is, perhaps, some reason for supposing that, if a case involving the ownership of plans should be vigorously pushed to a Supreme Court decision in some of the States in this country which show themselves most independent of foreign precedent, a conclusion might be reached more in accordance with the universal custom and understanding of architects and clients.

Marcotte vs.  
Beaupré,  
15 Minn. 152.

In a case in Minnesota, where an architect agreed to make plans for a house for a fixed price, and delivered them, but afterwards got possession of some of them and carried them away, it was held that there had been a sufficient delivery to entitle him to the price.

## CHAPTER XI.

### THE ARCHITECT'S DUTIES TOWARD THE BUILDER.

**I**N his relations to the builder, the architect, although employed by the owner, is bound to act fairly. However strict he may be in holding the builder to his contract, he must not try to overreach him, or enter into any secret arrangement with the owner to deprive him of any part of the money justly due him. In all cases, the architect is presumed to be an impartial man of science, and the contract between the owner and the builder usually makes him the final referee in matters relating to the construction of the building and the regulation of the accounts; but if it can be shown that he has a personal interest in distorting the facts in favor of either party, his award loses its validity, and both parties are absolved from accepting it.

In an English case, the architect, before the signing of the contract with the builder, guaranteed the owner that the cost of his building should not exceed a certain sum. The contract with the builder contained the usual stipulation, that the architect should decide all matters relating to extra work. After the completion of the work, there were extra bills, which the architect refused to certify; and, although the builder had agreed by his contract to accept the architect's decision in such matters as final, the court held that as the architect's guaranty tended to influence his judgment, and the builder had no knowledge of it when he signed his contract, he was not bound by the decision. So in another case, where the architect had

**Architect  
Must Act  
Fairly Toward  
the  
Builder.**

**Kimberly vs.  
Dick,  
3 L. R. Eq. 1**

*Kemp vs.  
Rose,  
S. C. 1 Giff. 258.*

assured the owner that his building would not cost more than a certain amount, although he did not give any guaranty to that effect, the court held that the architect's decision, given under such a bias, was not to be considered binding, and directed that the amount due the builder should be ascertained by an auditor, under the authority of the court.

*Ormes vs.  
Beadel,  
2 Giff. 186.*

Occasionally, the architect is led so far by his zeal for his employer's interests as to take a rather questionable advantage of his position, without any profit to himself, but it should be remembered that such conduct exposes him to personal liability to make good to the contractor the loss which his want of fairness may have caused. A builder had nearly finished a house, under a contract of the usual kind, when he came short of money, having been disappointed in receiving a large sum that was due him. He applied to the architect of the house on which he was at work for a certificate for another payment, but in vain. At last, his men, not being able to get their wages, became desperate, and he was warned not to come to the place where the work was going on, as his men had resolved to have him arrested if he came within their reach. Nevertheless, he went that same evening to the spot, and was received by a mob of his men. Escorted by them, he went to see the architect, who proposed to him that he should abandon his contract, and leave the question of how much should be paid him for what he had already done to be settled by appraisal by an expert. The architect drew up a paper containing an agreement to that effect, and said that if the unhappy builder would sign it, he would advance him money enough to pay off his men. The builder did so, and the architect gave him fifty pounds, and dismissed him, and the building was completed by other parties. The builder afterwards brought a suit in equity to have the agreement which he had signed set aside. Although the contract gave the architect the power of deciding without appeal all questions relating to the building, the court declared the agreement invalid, and ordered an accounting to be made of the value of the work and materials.

furnished by the plaintiff on the house, and the balance, if there should be any, after deducting what he had already received, to be paid over to him.

In a case of a different kind, estimates were obtained for building a house, and the tender of a certain builder was accepted. He was notified by telegraph to come to the architect's office and sign the contracts. He happened at the time to be suffering from an inflammation of the eyes, which rendered him nearly blind, and asked the architect to let him take the contracts home, and have them looked over by his lawyer. The architect refused, and intimated that if he did not sign them at once, the job would be given to another person; but he offered to read the contract over to him.

*Pawley vs.  
Turnbull,  
3 Giff. 70.*

He read the contract accordingly, but omitted to read a clause which provided that the architect should be the sole arbitrator in any dispute which might arise in regard to the building. The builder then signed the contract.

Certificates for payments were given very sparingly, and while there was yet a large amount of money due the builder, and before the work was finished, the architect suddenly took possession of the building, and proceeded to have it finished by other parties. No account of the value of what had been done was furnished to the original contractor, and in completing the work changes were made, which would affect the cost. The builder sued to have an account taken of what was due him, and the balance paid him; and the owner placed his defence on the ground that the contractor had agreed in the contract to abide by the decision of the architect in all such matters. If the builder had signed the contract without reading it at all, as will be seen later, or if the architect had faithfully read it all to him, and he had then signed, this defence would probably have prevailed; but the court held that the omission by the architect of the clause constituting him sole arbitrator released the builder from any obligation to be bound by it, and ordered the amount due the contractor to be ascertained and paid him, and condemned the owner and architect together to pay the costs.

Bliss vs.  
Smith,  
34 Beav. 508.

One more case, where the charge of unfair practices against the architect was disproved, but in which the court took occasion to explain the law relating to the matter, will be sufficient to illustrate this part of the subject. A man named Davis contracted to build a theatre. By the contract, the architects were to be the sole judges upon all matters relating to the contract, and their certificate was to be "binding and conclusive on both parties;" and, on any dispute connected with the works, their decision was to be "final, without appeal." Davis failed before the building was finished, and his assignee filed a bill in equity against Smith, the owner of the theatre, and the two architects, alleging that, although the architects "had not expressed and could not reasonably or fairly have expressed any dissatisfaction with the execution of the works, but were, in fact, satisfied therewith, they declined to ascertain or certify the amount due to the plaintiff, and withheld their certificate, contrary to and in violation of the duties undertaken by them." The complaint further alleged that in so refusing and declining the architects had "been and were acting under the authority and at the instigation of and in collusion with Smith, who had, in fact, forbidden them to accede to the said requirements."

Courts of  
Equity will  
interfere in  
Case of Col-  
lusion.

The Court of the Rolls, in Chancery, before which the case was tried, held, in general, that courts of equity would interfere where there was collusive dealing and concert between the employer and the person whom he had appointed architect, overseer or agent, for the purpose of injuring the contractor, or defeating his claim; and it would also interfere in cases where the accounts between the parties were so complicated that they could not be properly adjusted by a court of law. In the present case, the court found that the charge of collusion against the architects was completely disproved, and dismissed the case, with costs, remarking, in the manner characteristic of English courts, that the trouble with the builder was evidently not that he was badly treated by the architects, but that "he was trying to carry out his contract on too small capital."

It will be observed that all these are English cases; but as

the decisions seem to throw more light on the relations of the architect and the builder than the similar ones in our courts, in which the relation of the builder and the owner is made the principal point, and as these particular cases are much quoted as precedents in our courts, it seems best to give them.

It occasionally happens that delays occur in building through the fault or neglect of the architect; and in this case the architect must see that he does not try to push off the burden of responsibility for them from his own shoulders on those of the builder. The latter would probably not be allowed, if he had made no objection at the time to the delays, to pretend later that they had been the cause of a failure on his part to fulfil his contract; but, at the same time, the architect, if he had really caused serious delay by neglect to furnish drawings, for example, when the contractor needed and asked for them, would not be allowed to use his position as final arbitrator in matters relating to the contract, to impose penalties upon the contractor for the delay caused by his own neglect. In an English case, the architect had delayed the plans, and in consequence, the operations on the building. The contractor asked the architect for an extension of the time set for completion, but it was refused. The building not being finished at the agreed time, the contract was declared forfeited, and the work put into other hands. On the suit of the original builder, the contract was held to have been wrongfully forfeited.

In English practice, an amount of authority is given to the architect which is not so common here. Of course, the kind and degree of the authority which he shall have over the builder is always limited by the contract between the builder and the owner, and if the contractor does not wish to agree to take any particular architect as final referee in all matters relating to the building, he has only to refuse to sign a contract making him so. If, however, he agrees with the owner that certain matters shall be left to the architect as final referee, he will be understood as being willing to trust implicitly in his judgment and skill, so long as they are honestly exercised; and

**Delay  
Through Ar-  
chitect's  
Fault.**

**Roberts vs.  
Bury,  
4 L. J. C. P. 755,  
5 L. J. C. P.  
310.**

**Great Au-  
thority of  
Architect in  
England.**

*Stevenson vs.*  
*Watson,*  
4 C. P. D. 148.

he will not generally be allowed to call that judgment and skill in question in court, unless he is prepared to prove that they have been dishonestly and fraudulently perverted for his injury. A builder once, being disappointed in the amount of the final certificate which he had received from the architect, and finding it impossible to collect from the owner any more money without an additional certificate, sued the owner for the balance which he conceived to be due him, and endeavored to evade the clause in the contract which made the obtaining of a certificate the indispensable preliminary to the payment of any money by the owner, by alleging that the architect did not use due care and skill in ascertaining the amount due, and that he had knowingly or negligently certified to a much smaller sum than was, in fact, due, and had refused to reconsider his certificate. The court held that "no cause of action was disclosed." If the builder had charged that the architect fraudulently, and in collusion with the owner, had given a certificate for less than was due him, his complaint would have shown a good cause of action, although, of course, he would have had to substantiate his charges, or lose his case; but the court would not help a man to escape from the award of an architect in whose skill and care he had agreed to trust, on the ground that he had turned out not to be so skilful and careful as had been supposed.

This rule is, however, not without certain exceptions in this country, which will be treated of later, so that architects should not fail to show diligence and care, as well as perfect honesty, in their adjustment of accounts between the owner and the contractor, if they would escape all blame.

## CHAPTER XII.

### THE BUILDER'S DUTIES TOWARD THE ARCHITECT.

**A**FTER the builder has signed his contract, agreeing to do certain work under the supervision, according to the directions, and to the satisfaction of a certain architect, he must see that his promises in this respect are strictly complied with. Many builders, especially in the country, where work is very commonly done from the builder's own plans, and without the supervision of an architect, appear to be tormented by jealousy of any architect under whose direction they happen to be placed, and, notwithstanding their promise in their contract to obey his instructions, take pleasure in disregarding them, and in varying wantonly from his drawings, apparently with no object except to show their independence of him. These actions are not only very annoying to the architect, but are decidedly injurious to him, as the effect of the building, as a work of art, may be ruined by slight variations in the projection of a cornice, or the spacing of string-courses; yet, if the materials and workmanship are good, so that the builder cannot be accused of cheating his employer, the architect dislikes to delay the structure by ordering, as he has an undoubted right to do, the portions incorrectly executed to be pulled down, and rebuilt in accordance with the drawings to which the builder has agreed to conform.

**Builder  
Must Keep  
His Prom-  
ises.**

Moreover, he knows by experience that the owner is likely, if he says anything about the matter, to consider him conceited and unreasonable in making so much fuss about conformity



with his design, which, as the builder maintains, is no better than any carpenter could make, and not so good as the modification which has already been executed; so that, unless he is sure that the owner will support him, even to the extent of waiting a little longer for his house, in demanding exact compliance with the plans, he will probably let the matter go, and content himself with a resolution never to have anything more to do with that builder.

Importance  
of Satisfying  
the Archi-  
tect.

Such conduct as this, while dishonorable and wrong, is extremely dangerous for the builder. It will be shown later, by many examples, that if the owner should choose to take the architect's view of the matter, the contractor may be compelled to correct every intentional or accidental variation from the plans to which the architect has objected, even if he should have to pull down and rebuild the house from the foundations to do so.

Where the builder finds himself in a predicament of this sort, he usually tries to escape from it by alleging that he did not understand the plans, or that they were obscure, or impracticable; and it is well to be forewarned that this defence would avail him nothing before a court. It has been held by the two highest courts of Illinois that "a contractor is not excused for "not understanding the plans. His undertaking to erect a "building in accordance with certain drawings and specifications implies that he does understand them, and he cannot "escape liability on the ground that he exercised ordinary skill "and care to understand them, and failed to comprehend them. "In such a case, if there is obscurity in the drawings, contractors must apply to the architect for directions, where "work is to be done under the direction of an architect. If "they rely on their own judgment, they must take the consequences."

Clark vs.  
Pope.  
70 Ill. 123.  
—  
Trustees vs.  
Platt,  
5 Bradw. 567.

In regard, also, to the clause embodied in most building contracts, which provides that the work shall be done to the satisfaction of the architect, and that payments are to be made only on the production of his written certificate that he is

satisfied with it, the builder may find that the dissatisfaction which he has given the architect a right to feel may show itself very unpleasantly when he calls for his final payment. Under such a clause, even though no important violation of the contract may have been committed, if the architect honestly believes that the building has not been carried out in entire compliance with the drawings and specifications, and is therefore worth less to the owner than it would have been if the contract had been strictly performed, it is not only his right, but his duty, to make such deduction from the contract price as he thinks fair; and the builder will not be permitted to appeal from his decision on the ground that he ought to have been satisfied, or that he was unreasonable in not being so.

In fact, to agree to do any sort of work to another person's satisfaction is a more serious matter than most people suppose. The majority of mankind are easy-going and honest, and would rather accept something that they did not want than oppress a person who had agreed to furnish them something different; but there is no question that if a man makes a contract for a certain thing, he is entitled to receive just that thing, if he chooses to require it; and if he stipulates that the object shall be satisfactory to himself, or to another specified person, it must be made satisfactory before he is obliged to accept it, and he need not give any reason for his dissatisfaction, provided it is sincere, and is not pretended for the sake of escaping from a just obligation. A sculptor once secured a commission for making a portrait bust through a third person, who, in soliciting the work for the sculptor, said that the lady for whom the bust was to be made "need not take it unless she was satisfied with it." The bust was artistically executed, and was a good likeness of the person represented, and was made in accordance with the suggestions of the lady; but, when it was done, she said that she would not take it or pay for it. The case was brought into court, and the plaintiff proved that the defendant's dissatisfaction was unreasonable, and was due to her ignorance of the necessary qualities of sculpture in white

**Satisfac-  
tion.**

*Zelik vs.  
Clark,  
44 Conn. 218.*

*See also  
McCarren vs.  
McNulty,  
7 Gray, 139.*

*Brown vs.*  
Foster,  
113 Mass. 136.

*Smith vs.*  
Briggs,  
3 Denio, 73.

*Glaciue vs.*  
Black,  
50 N. Y. 145.

*Gibson vs.*  
Cranage,  
39 Mich. 49.

*See also*  
*Clarke vs.*  
Watson, 114  
Eng. C. L. 278.

*Scott vs.*  
Corp. Liver-  
pool, 60 Eng.  
C. L. 334.

*Moore vs.*  
Goodwin,  
43 Hun. 534.

material; but the Supreme Court of Connecticut said that "he who contracts to do work which will satisfy one, does not make out a case by showing that the work done will be satisfactory to ten thousand others"; and held that the contract was not performed, and that the plaintiff could not recover.

In a somewhat similar case, decided in Michigan, the plaintiff called on a man, and solicited the privilege of making a portrait of his deceased daughter. He said he would take a small photograph, and send it away to be enlarged and finished, and when it was done, if it was not satisfactory to him in every particular, he need not take it or pay for it.

The picture was done, and shown to the defendant, who was dissatisfied with it, and refused to accept it. The plaintiff endeavored to ascertain what his objections to it were, but could not learn clearly. He then sent the picture back to the artist, to be changed. The next day, he received a letter from the defendant, repeating that the picture was not satisfactory, and that he declined to take it, or any other similar picture, and countermanding the order. When the altered picture was received from the artist, the plaintiff took it to the defendant, who refused to look at it, and he did not see it until the trial of the suit, when he examined it, and found the same objections still existing. The Supreme Court held that, under the agreement, the defendant was the only one to decide whether the picture was satisfactory, and that he had a right to say whether he would accept or pay for it.

In the same manner, where it was agreed that a portrait should be paid for only if the defendant's "friends" should decide that it was a good likeness, it was held in New York that the plaintiff could not recover, although the jury were satisfied that it was a good likeness. In this case, as no particular persons were named as the "friends" to whom the decision was to be confided, the plaintiff's counsel argued that the provision was void from being too indefinite; but the court thought that it was sufficiently definite.

In these cases, it was distinctly agreed that the work should

*Hoffman vs.*  
Gallagher,  
6 Daly, 42.

be done to the satisfaction of some specified arbiter. Where this stipulation is not made, it will rest with the jury to say whether it has been properly performed.

In a case where a man had a portrait of a yacht painted, it was held in New York that the employer was not the sole arbiter as to whether the work had been properly performed, unless there had been a stipulation to that effect.

It occasionally happens in building contracts that two persons are named, to whose satisfaction the work must be done; these two being sometimes the architect and the owner, or sometimes the architect and a superintendent. In these cases, it seems to be the law that it is only necessary to satisfy one of them, although much would depend upon the wording of the contract.

A contract in Wisconsin provided that the work should be done in a good, substantial and workmanlike manner, to the satisfaction of the architect; and, further on, it said that the work was to be executed to the full satisfaction of the architect, and to the satisfaction of the owner. The court held that this last clause was put in the contract only to prevent changes of plan or design without the owner's approval, and that, if no such change was made, and the architect accepted the work, the contract was fulfilled.

So where a contract said that certain work should be done "to the satisfaction of the architect or his assistant or superintendent," it was held that work done to the satisfaction of either party named complied with the contract, and that it was not required to do it to the satisfaction of both.

*Bassford vs.  
Oelrichs,*  
40 Hun. 637.

*Tetz vs.  
Butterfield,*  
54 Wis. 242.

*Vermont St.  
Church vs.  
Brose,*  
104 Ill. 206.

*Wilkey vs.  
Paw Paw,*  
25 Mich. 419.

## CHAPTER XIII.

### THE AUTHORITY OF THE ARCHITECT OVER THE BUILDER.

**Authority  
of Architect  
Derived from  
Contract.**

**I**T will have been observed that nearly all the controversies in regard to building contracts in which the architect is engaged turn upon the matter of the final certificate, and it is usually not until this is given that the builder and the architect come into collision. The reason for this is that the accounting for extra work, which involves the validity of orders, the reckoning of deductions for omissions, which the builder might have made good at any time during the progress of the building, but has failed to rectify, and the adjustment of claims for imperfect or unsatisfactory work, are commonly postponed until this time, and it is only then that questions begin to be raised as to the authority of the architect over the builder.

It is, perhaps, necessary to repeat that this authority is derived entirely from the contract between the builder and the owner, and is strictly limited by its terms, and that architects, as such, are far from being endowed with any inborn authority over builders, or any one else. It not unfrequently happens that an owner who has already made a contract with a builder, in which nothing was said about any architect, concludes that it would be better to have an architect look after the work, and engages one, in the expectation that he will be able to exercise something like the same control over it as one who had been appointed in the usual way, before the signing of the contract, and agreed to by both the parties to it.

The results of this misapprehension are sometimes annoying. Although the architect may be of service, if the contractor chooses to admit him into the building, in watching for defective workmanship, and pointing it out to the owner, he has no authority over the contractor unless the latter makes a supplementary agreement giving it to him, and his directions, except so far as he may give them in the owner's name, and by special authority from him, are no more to be regarded than those of any bystander.

If, however, the owner and the builder have agreed that a certain architect shall be empowered to do certain things, he is thereby authorized to do those things, but nothing more. For example, it is common for building contracts to provide that the architect shall have power to order extras; but, if it does not so provide, he does not possess that right unless in the case of emergencies of construction, such as have been previously spoken of.

In a Connecticut case, the contract between an owner and a builder provided that the contractor should build a house according to plans and specifications made by a certain architect named Easton, and under his superintendence and to his acceptance. The owner, Goodman, reserved the right to order extras or alterations, but the contract did not say that Easton should be entitled to do so. During the progress of the work Easton ordered various alterations and additions, which the builder, Smith, carried out. The building was delayed by these extra works beyond the contract time of completion. Smith, the contractor, at Goodman's request, showed him, before the house was done, a bill of extras to date. Goodman did not say that he had not ordered them, and more extras were ordered before the house was done.

Smith failed, and his assignee claimed payment for the extra work on the house. Goodman paid for some extra work that he had himself ordered, but refused to pay for the rest, saying that it was ordered without his knowledge or consent, and demanded forfeiture, according to the contract, for the

**Starkweather**  
vs.  
Goodman,  
48 Conn. 101.

**Extras Or-**  
**dered by Ar-**  
**chitect.**

delay in the completion of the house beyond the agreed time, although the delay was rendered necessary by reason of the extra work which Easton had ordered. The controversy was brought to the Supreme Court, which decided that Easton was not authorized to order extra work, and that, when Smith did it at his order, he assumed the risk of the ratification of the order by Goodman. The court said that the fact that Goodman received in silence a statement of extra work did not prevent him from insisting on the contract, for at that time the extra work had been done, and could not be removed, so that Smith was no worse off through Goodman's failure to object than he would have been otherwise.

*Cooper vs.  
Langdon,  
9 M. & W. 60.*

In England, where a contractor varied from the plans and specifications by order of the architect, and was sued for damages by the owner for having varied from the contract, the defence was set up that, as the orders were given by the plaintiff's architect, the builder was not liable for damages for following them. The Court of Exchequer held that this defence was bad, as the architect was not shown to have been the owner's agent to bind him by any deviation from the drawings.

*Smith vs.  
Gugerty,  
4 Barb. 614.*

Even where the architect is authorized by the contract to give orders, they must be given in the manner that the contract requires, and, if the contractor follows any directions given by the architect in any other manner, he does so at the risk of having them repudiated by the person who is to pay for the work. It is sometimes held that the owner, where the contract provides that orders for extras shall only be given in writing, may give oral orders, and that he shall be held to have waived, by an implied supplementary agreement, the provisions of the contract, and shall be bound to pay for the work done in pursuance of such oral orders, on the ground, as stated by the New York Supreme Court in a particular case, that "it was competent for him (the owner) to waive the provision requiring a written order, and the waiver might be oral"; but the architect, not being a party to the contract, has no power to waive, or agree to waive, anything in it. On the

same principle, the architect has no authority to vary the contract, or to give any orders inconsistent with it, and a builder who executes such orders does so at his own risk.

Naturally, where a builder finds, at the completion of the work, that some of the items which he has charged as extra will not be allowed, for the reason that they were not ordered in the way provided by the contract, he endeavors to show that he had received in some way such instructions as would be equivalent to the kind of order required by the agreement, or that the informal order had been so ratified subsequently as to have acquired the same force as if it had been given properly in the first place.

In cases where the irregular order was given by the owner, this may sometimes be done, as will be shown later by several examples; but it is much more difficult to persuade a court that an informal order from the architect should be regarded as having the force of one issued in accordance with the contract. The contractors for an iron building in England, who had agreed to do all the work, in accordance with the drawings and specification, for a fixed sum, went to the engineer who designed the building, and told him that it would be impossible to cast the "trough" or box girders so light as the drawings showed them. They were told that they might cast them much heavier, and, in the certificates for interim payments, the engineer allowed for the extra weight of iron so used. On adjusting the accounts at the completion of the building, the value of the extra iron was added to the amount of the contract. The contract provided that no additions or alterations should be made without the written order of the engineer; but the contractors claimed that the written certificates of the engineer, given after the extra work was done, but approving the charges made from time to time for it, were equivalent to the orders contemplated by the agreement. The court held that the certificates were not written orders, and that the claim of the contractors was therefore excluded by the terms of their agreement.

*Tharls Sulphur Co. vs. McElroy,*  
3 L. R. App.  
1040.



**Variation  
Between De-  
tail and Gen-  
eral Draw-  
ings.**

It often happens that, as the work progresses, and the design becomes developed into detail, working-drawings are sent out which differ somewhat from the plans at a smaller scale which have served for estimating, and have been accepted as forming part of the contract. In such cases, if the work shown on the new detail drawings is more complicated or expensive than that which was contemplated by the contract drawings, a question frequently arises, particularly at the completion of the work, when the builder counts up his profits, whether an extra price cannot be recovered for executing the work in accordance with these more elaborate designs, instead of according to the simpler ones shown in the contract drawings.

The answer to this question is given differently under varying circumstances, and by different courts.

**Drawings  
as Written  
Orders.**

*Myers vs.  
Sarl,  
80 L. J. Q. B. 9.*

It has been held in England, that where the contract provided that orders for variations from the contract might be given by the architect, but should not be valid unless given in writing, detail drawings, varying from the contract plans, were not to be regarded as written orders unless they were signed by the architect.

*Guerin vs.  
Rodwell,  
8 Vr. 71.*

In our courts, the law appears to be rather uncertain. A contractor in New Jersey built a house from plans furnished by an architect, and under a contract and specifications. The architect furnished working-drawings for the vestibule doors, which varied from the specification, and the contractor made them according to the working-drawings. When they were brought to the house, the owner saw them, and objected to them, saying that they were not in accordance with the specification, and refused to accept or pay for them, and required that doors should be made according to the plans and specification. The contractor changed the doors, in accordance with the original agreement, and they were accepted and paid for under the contract, but the owner refused to pay anything for the doors which had been made from the architect's detail drawings, or for having them altered. The builder sued, and the judge of the District Court held that the architect was the

agent of the defendant for the purpose of directing the work which was done by the plaintiff, and that the plans given by the architect to the plaintiff being erroneous, and causing him additional expense in making the doors, the defendant became liable to the plaintiff for the charge for alterations necessary to make the doors correspond to the requirements of the contract and specifications.

The case was appealed to the Supreme Court, which confirmed this view, saying, "Both the plaintiff and defendant are 'innocent, but the defendant has put his agent in a position to 'injure the plaintiff, and he must pay for it.'"

It does not appear, in this case, whether the contract provided that no changes from the contract should be made by the architect unless ordered in writing; and it would not be safe to presume too far upon the application of this doctrine.

In another New Jersey case, decided some years later, a contractor named Condon had agreed to build a police station-house for a certain sum. At the completion of the building, Condon claimed \$700 for extra work, partly for additions and alterations, and partly for work done on account of mistakes of the architect. The contract provided that all alterations and additions should be specified in writing, and approved by the committee on public buildings. There appeared to have been a plan or drawing of the principal addition and alteration; but the court held that this was "not a compliance with the provision of the contract." The extra work rendered necessary by the mistakes of the architect was done in one of the alterations. The court said that "none of the additions or alterations 'were specified in writing within the meaning of the contract.'"

In actual practice, as it is impossible to show, at the small scale of the contract drawings, all the detail which would appear on the working-drawings, persons familiar with architects' plans always infer, on examining the general drawings, that a certain amount of further detail will be shown later at a larger scale; and it would be quite unfair for the builder, at the completion of the work, to be allowed to exhibit the detail

*Guerin vs.  
Rodwell,  
8 Vr. 71.*

*Condon vs.  
Jersey City,  
14 Vr. 452.*

*Trustees vs.  
Platt,  
5 Bradw. 567.*

drawings which had been made by the architect, and, as he supposed, accepted by the builder as simply the natural development of the design shown at a smaller scale on the contract drawings, to a jury, and recover whatever they might think fit to allow him for what they considered to be the discrepancy between the two representations of the same thing. This point has also been recognized by the courts. In an Illinois case, it was held that, "if the detail drawings, when received, "show work differing from the contract, or unusual, the contractor should make objection before doing the work."

*Stuart vs.  
Cambridge,  
125 Mass. 102.*

A Massachusetts decision carries the same doctrine very far, and may, perhaps, best be here given at length, although it involves other questions as well as this.

A contractor named Stuart agreed in writing with the city of Cambridge, for a given sum "to provide all materials and perform all labor required in the erection of a public building on a certain parcel of land, according to plans, drawings and accompanying mason's specifications, prepared by a certain architect, and such other drawings and detail explanations as might be considered necessary for the progress and completion of the building, according to the true intent and meaning thereof." The agreement also provided that "in case any particulars should be deficient or not clearly shown by the plans, or expressed in the specifications, the contractor should carry out the general design, as directed by a certain committee and the architect, in as thorough manner as if the same were shown and fully expressed; that it should be lawful for the committee or architect to direct in writing any additions to or deviations from the plans and specifications, and in such case such sums of money should be added to or deducted from the agreed price as the parties to the agreement should judge the increase or diminution to be worth; that no alterations or additions should be paid for unless so directed in writing."

The specifications provided that the contractor should "remove the earth from the area of the lot to be covered by

the building to the requisite length, breadth and depth for the basement, walls, foundations, etc.; that the exterior basement foundation walls should be constructed of large, flat blue-stone, to be faced upon both sides, and laid solid in and pointed on both sides with mortar; that the earth beneath the walls should be thoroughly tamped and puddled, and the bottom course firmly bedded upon it; that all the basement walls should commence fourteen inches, at least, below the basement floor, and as much deeper as necessary, to guarantee a firm and solid foundation, the walls to be of the thickness and construction indicated by the drawings; that the contractor should do any and all other masonry necessary to fully finish and complete all parts of the building, according to the true intent and meaning of the plans, drawings and specifications, whether particularly therein described or not."

Stuart vs.  
Cambridge,  
125 Mass. 102.

The plans showed a section of the foundation walls fourteen inches below the basement floor, and no more, and did not indicate any piles, nor were any mentioned in the specifications. In excavating for the foundations, the soil was found to be of such a character as to require, in the opinion of the architect, piles to be driven in order to secure a firm foundation for a part of the walls. The architect accordingly furnished piling plans, directed the contractor to do the work, and orally promised him that he should be paid for it. "Stuart drove the piles, cut them off, placed coping (capping) stones on them, and rubble-stones on the coping-stones up to the line of the foundation walls, as shown on the plans."

Piling not  
shown on  
Plans.

On the completion of the building, the city refused to pay for the piling and the extra stonework, and Stuart brought suit, but was defeated. The judge in the court where the case was first tried ruled that, by the contract and specifications, Stuart was bound to insure a safe foundation for the proposed building; that the defendant (the city of Cambridge) might require him to go to any depth necessary for that purpose; that, if it were necessary to drive piles to secure such a result, then the plaintiff was bound to drive piles as part of his

Stuart vs.  
Cambridge,  
125 Mass. 102.

contract, and was not entitled to recover any extra compensation therefore.

Stuart offered parol evidence that he made his estimate for the cost of the work, based on the showing of a section which required a depth for the foundation walls of only fourteen inches below the basement floor, and that other persons in the same business were accustomed to make estimates in a similar manner. This evidence was ruled out as incompetent.

The Supreme Court sustained the decision of the court below in all these points. It said that "by a fair construction of this contract, the plaintiffs agreed to do all the work necessary to secure a solid foundation. They took the risk of its being necessary to drive piles in order to secure such foundation. The ruling of the Superior Court as to the construction of the contract was therefore correct."

As to the architect's parol order and promise, the court said, referring to the clause in the contract which provided that no alterations or additions should be paid for unless so directed in writing, "No evidence was offered of any waiver of this provision by the defendant, or of any authority in the architect to waive it." "This clause was intended to protect the defendant against claims for extra work under alleged oral directions or contracts. If the evidence offered can be construed to show an oral promise by the architect, founded upon a sufficient consideration, to pay for the work sued for as extra work, it was made without authority, and is not binding upon the defendant."

There was a clause in the contract which said, "And it shall be lawful for the said committee or architect at all times to direct in writing any additions to or deviations from the plans and specifications aforesaid," etc.

Stuart's counsel does not appear to have brought up the point directly whether the piling-plan was not equivalent to an order in writing, and none of the judges mentioned it, but it is clear that they considered the order to be an oral one. This decision does not appear to have been overruled or questioned,

so that drawings may be definitely regarded as not being equivalent to written orders in Massachusetts.

Where, as occasionally happens, there is a discrepancy between the drawings and specifications, or between the drawings themselves, there are some differences of opinion among the courts as to which should be held to be of the greater authority. In general, however, it seems to be the rule that the specification controls the drawings, and that a detail drawing is of more authority than a small scale drawing of the same thing, while the contract takes precedence of them all. Where exceptions have been made to the rule, they seem to have depended upon special circumstances.

To take first an example illustrating the rule :

A specification for an armory in Massachusetts called for "vaulted walls," "to be bound across by turning headers"; and another clause required the mason-work to be completed "in a good and workmanlike manner." Under the contract, the work was to be done "in all respects according to the plans and specifications furnished by the architects."

The plan furnished showed the walls in horizontal section, shaded uniformly in red, sixteen inches thick, with no indication of any vault or hollow space in them. The contractor soon abandoned his job, but not until after sub-contracts had been made for a part of the work, and in a suit concerning one of these sub-contracts a court was called upon to decide what the plans and specifications meant. The defendant in the case offered the testimony of an architect and builder, who said that in his opinion the contract called for a wall of sixteen inches, exclusive of the vault, which would be two inches, so that the whole thickness of the wall would be eighteen inches; and that it would be impracticable and unsafe to build a sixteen-inch wall with a vault. The court rejected this evidence, and ruled that by the contract the walls were to be only sixteen inches thick, including the vault.

The case was appealed to the Supreme Court, which approved this ruling, and said, "The party for whom the work

**Drawings  
not Equiva-  
lent to Writ-  
ten Order in  
Massachu-  
setts.**

**Specifi-  
cation Controls  
Drawings.**

**Smith vs.  
Flanders,  
129 Mass. 322.**

*Smith vs.  
Flanders,  
129 Mass. 322.*

"is done is to determine as to the character of the work he requires, and, if done according to contract, he must take the risk of its being practicable and safe." As to the discrepancy between the plan and the specification, the court said:

"But as between the positive requirement of a written clause in the contract, and a plan referred to, which, though perfect in other respects, shows an omission to indicate thereon this single matter of detail, there can be no doubt that the written clause must control the mere implication derived from the omission in the plan. This is in analogy to the rule by which, when there is discrepancy between the written and printed portions of a contract, the former will prevail over the latter."

*Dist. Columbia  
vs.  
Gallagher,  
124 U. S. 505.*

On the other hand, the District of Columbia, through its officers, once made a proposal for finishing a sewer, saying, "the size and manner of construction to be the same as that of the portion of the same sewer" already constructed. The proposal was immediately accepted, and a few days later a written contract was entered into. Before the work was commenced, the engineer furnished a working-drawing, showing construction similar to that of the existing portion; and 680 feet had been built, without objection, when the form of the District Government was changed, and a new engineer appointed. The new engineer examined the work, and found that the skewbacks, like those of the existing portion, and like the drawing, were being built of rubble, while the written contract required them to be of large cut blocks of granite. He was told that to make them of cut granite would cause considerable delay, and he said he would consent to having them built of brick, but should make a deduction in the price; but named no sum. When 4,000 feet or so had been completed, the contractors applied for a payment. The engineer, Lieutenant Hoxie, made a statement of the deviations from the specification, and recommended a deduction from the contract price of \$8.94 per lineal foot of the sewer, amounting to \$35,436.49, on account of them. The account was paid, with

this deduction, and the contractors sued for the balance. The case was tried in the Supreme Court of the United States, which held that the contractors were entitled to recover it, saying that, "When, in the performance of a written contract, 'both parties put a practical construction upon it which is at 'variance with its literal meaning, that construction will prevail over the language of the contract.'"

*Dist. Columbia  
vs.  
Gallaher,  
124 U. S. 505.*

It is worth remarking, although the point was not brought up, that, in the light of decisions previously quoted, Lieutenant Hoxie incurred a great risk in ordering the skewbacks built of brick. However it might be decided as to the relative authority of the drawings and specifications, there was no doubt that neither of them indicated the use of brick; and, unless Lieutenant Hoxie was clothed with the power of setting aside the contract altogether, he could not legally authorize, in so important a part of the construction, the use of a material which was not mentioned in any part of the specifications, or indicated on the drawings, as acceptable for that purpose.

Where a contractor has actually been misled by a discrepancy between two sets of drawings, of equal importance, it seems to be well settled that he is bound only by the ones which were shown him when he was making up the estimate on which his contract was based.

*Contract  
Based on  
Drawings  
Used for Es-  
timating.*

When the new City Hall for Chicago was building, tenders were invited for the iron-work. One Sexton, with others, made estimates. Some of the bidders looked at the original plans, while others, among whom was Sexton, had tracings given them to figure on. The tracings showed iron rafters weighing seven pounds per foot, and the foundation for skylights, with certain lines across the openings. The printed invitation to bidders called for estimates for the work including skylights, and the original drawings showed them, and showed also heavier rafters. Sexton called the attention of Jordan, the draughtsman in charge of the office in the absence of the city architect, to the fact that nothing in the tracings or specifications showed what the skylights were to be. Jordan told

*Sexton vs.  
Chicago,  
107 Ill. 323.*



*Sexton vs.*  
Chicago,  
107 Ill. 323.

him that the plans for the skylights were not ready, that no sizes were marked on the tracings, and that he should not figure on them. Sexton put in his bid accordingly, and it was accepted, and a contract made by the city with him, which referred to "the plans, diagrams and specifications made and prepared for said work." When Sexton came to build the roof, the city demanded that he should put in rafters weighing from ten to thirteen and one-half pounds per foot, and should build the skylights. This he refused to do. On the trial, it was argued, on behalf of the city, that the original plans were the ones referred to in the contract, and that Sexton might have seen them, if he had asked to do so. The Supreme Court held that, although certain principles of law distinguish copies from original documents, they did not apply in this case. "The tracing copy," it said, "appears, at the time it was made, to have been an exact copy of the original, and it seems that changes were afterwards made on the original, which, through inadvertence, were not corrected on the copies. This was the fault of the city, and the loss due to it cannot be fastened on Sexton, who is not to blame for it. The expression 'plans and specifications,' in the contract, does not refer exclusively to the original plans from which the tracings are made. The latter, though for convenience called 'tracings,' are as clearly 'plans' within the meaning of the contract, to the extent of the work represented on them, as the originals. In this case, they were given to Sexton to estimate from, and he had a right to assume that they were the plans referred to in the contract."

**Discrepan-  
cies in Speci-  
fications.**

*Williams vs.*  
Fitzmaurice,  
3 H. & N. 844.

Where the discrepancy is between two different clauses in the specification, or between the specification and the contract, there is greater difficulty in deciding which forms the actual agreement between the parties, but the decisions of the highest courts are usually found to agree with the conclusions of common-sense, without much regard to fine-spun technicalities. A builder named Williams agreed to build a house for the Hon. Captain Fitzmaurice. He furnished his own specifications.

In the specification, under the head of "Carpenter and Joiner," a description was given of the dimensions of the joists, rafters, ridges, etc., but no mention was made of the flooring-boards.

Williams vs.  
Fitzmaurice,  
3 H. & N. 844.

The specification stated, in general, that "the whole of the materials mentioned or otherwise in the foregoing particulars, necessary for the completion of the work, must be provided by the contractor." At the foot of the specification, Williams signed a memorandum, whereby he agreed with Captain Fitzmaurice "to do all the works of every kind mentioned and contained in the foregoing particulars, according, in every respect, to the drawings furnished, or to be furnished," for the sum of 1,100 pounds. The house was agreed to be completed and fit for occupation by August 1, 1858. Williams prepared the flooring-boards, brought them to the premises, and planed and fitted them to the various rooms; but refused to put them down without extra payment, because, as he said, the flooring was not mentioned in the specification; whereupon Fitzmaurice put an end to the contract, took possession of the works, and proceeded to complete the building, and used for the purpose the floor-boards which had been prepared for it. Williams demanded payment for the floor-boards, which, as he claimed, were his property, and, in the final settlement, refused to allow anything for the flooring. Both these points were brought before the court, which decided that Williams was not entitled to recover for the flooring as an extra, because it was included in the contract, though not mentioned in the specification; and that he could not maintain trover for the flooring-boards left on the premises by him, and subsequently used by Fitzmaurice.

It appeared by the evidence that when Williams had got as far as the floors, and had the stock for them on the ground, and fitted to its place, he sent the following letter to Captain Fitzmaurice.

"CONWAY, February 20, 1858.

"I am unable to proceed with your building, for want of the floor-boards being put down, which are not part of my contract. If you wish me to put them down, I will do so on

Williams vs.  
Fitzmaurice,  
3 H. & N. 944.

having an order to that effect. Unless they are put down immediately, I shall not be able to complete my contract by the time fixed, and if they are not down within four days from this time, I shall conclude that you do not intend for me to go on with my contract, and I will measure the work that I have done, so as to be paid for that only."

(Signed,)

OWEN WILLIAMS.

There was some further evidence to the effect that Captain Fitzmaurice, before the contract was signed, wrote to Williams, saying that there appeared to him to be some omissions in the specification, but that he trusted to him to do everything as it should be ; and it appeared that the payments which Williams had already received, at the time when he stopped work, amounted to more than the value of what he had done.

Baron Pollock, for the court, said : " I own that when the " rule was moved I had some doubt whether the specification " was not to be regarded as the contract between the parties ; " but, upon the whole facts being disclosed, it appears to me " that no person can entertain any reasonable doubt that it was " intended that the plaintiff should provide the flooring, as well " as the other materials requisite for the building, and that it " was merely by inadvertence that no mention of the flooring " was made in the specification. That the plaintiff intended to " do it is manifested by his providing the material, which is " brought to the house ready to be put in its place as flooring."

Baron Channell said : " I am of the same opinion. The " contract was that the *house* should be completed and fit for " occupation by the first of August, 1858, not that the *works* " thereinbefore mentioned should be completed by that day. I " think that, looking at the terms of the contract, it would not " be reasonable to read it as if it excluded all work not speci- " cally mentioned. The plaintiff contracted to do the entire " work, in the various characters of bricklayer, carpenter, " plumber, etc., for the sum of £1,100, and it is not the less a " contract to do the whole, because it is specified that certain

"parts of the building shall be constructed in a particular way.  
"It was a contract for the erection of a house, and, though the  
"flooring was not mentioned in express terms, it was neces-  
"sarily implied."

In a California case, however, where the contract was to build a house according to certain specifications, and the specifications said nothing about the roof, it was held that the roof was not included in the contract.

Reynolds vs.  
Jourdan,  
6 Cal. 108.

Experts were called in to testify that the roof was implied in such contracts, if not mentioned; but the court said that:  
"Where a contract to build a house contains a specific  
"description of every part, with one exception, stipulating for  
"the manner, size, measurement and material of each with  
"great particularity, it must be held that the exception was  
"the result of design, and did not enter into the contract  
"of the parties."

## CHAPTER XIV.

### THE ARCHITECT'S CERTIFICATE.

**The Certifi-  
cates.**

**A**FTER all the work is done, all the extra work noted, and if allowed as extra, a reasonable price fixed for it, and an account made of all omissions, in order that, if the owner does not wish to have them made good, a proper allowance may be made for them, the architect issues his certificate, which, being the document in accordance with which the accounts are closed, should be prepared with conscientious care. It is usual to pay the builder instalments of the contract price, as his work goes on, in accordance with interim, or provisional, certificates given by the architect, and, as it is impossible to judge as accurately of the value of work partly done as it is of a completed job under a contract, and as a large reserve is usually made from the total amount earned by the contractor, to serve as a margin to cover contingencies until the completion of the contract, the architect is commonly allowed a certain liberty in estimating the provisional amounts due; but he must, nevertheless, be careful not to over-estimate them, or he may, if the builder should suddenly abandon his contract, as builders are strongly tempted to do when they come into possession of more money than they have properly earned, find himself, like the unfortunate Canadian architect whose case is mentioned on page 76, compelled to pay out of his own pocket the difference between what he ought to have certified and the amount which the builder has obtained.

**Irving vs.  
Morrison,  
27 C. P. (Upper  
Canada) 242.**

It ought not to be necessary to say again that the certificate,

if the contract requires that one should be given before the builder can collect his money, must be in the form which the contract provides. This point is held very strictly by courts. An architect, where the contract was in the usual form, gave a certificate, saying that the work was done in such a manner that he would accept it if he were the owner, and that he was satisfied with it; but this was held in New York to be insufficient. So in Missouri, where the contract said that "a certificate" should be obtained by the contractor, prior to each payment, signed by the architects, and countersigned by the sureties; and that the final payment should be due "when the whole job is completed and accepted"; a final statement, approved by the architects, was held not to be a sufficient certificate to satisfy the contract, and the builder was held not to be entitled to recover upon it.

On the contrary, in a case in New York, where the architect had simply certified that the final payment was due "under the contract," this was held to be "under the circumstances" sufficient; and where the interim certificates had been given in the form: "This is to certify that \$—— is now due to A. B. on account of his contract with you for doing the mason's and carpenter's work of" etc., and the owner had made payments on them without objection, at the time of their presentation, to their form, it was held that he could not raise the objection to them, for the first time, at the trial, that they were insufficient.

A contract provided that payment was to be made "when all the works are completely finished, and certified by the architect to that effect"; but without specifying the form of the certificate. The architect gave a certificate, saying, the contractors "have completed the masonwork to your building"; and this was held to be sufficient.

In Illinois, a certificate was given on what appears to have been a printed form, but which did not give all the assurances stipulated in the contract; and it was held, as being partial only, to be insufficient to compel payment.

Smith vs.  
Briggs,  
3 Denio, 73.

Roy vs.  
Hoteler,  
40 Mo. App. 213.

See also.  
Barney vs.  
Giles,  
120 Ill. 154.

Adams vs.  
Mayor,  
4 Duer, 235.

Wyckoff vs.  
Meyers,  
44 N. Y. 143.

Bloodgood vs.  
Ingoldsby,  
3 Hilt. 383.

Stewart vs.  
Keteltas,  
9 Bosw. 261.

Barney vs.  
Giles,  
120 Ill. 154.

Weeks vs.  
Little,  
47 N. Y. Super.  
Ct. 1.  
—  
Mercer vs.  
Harris,  
4 Neb. 82.

Vermont Street  
Church vs.  
Brose,  
104 Ill. 207.

Lincoln vs.  
Schwartz,  
70 Ill. 134.

After a certificate is given, the architect cannot recall it, unless he discovers that there was some mistake in it. An architect once gave a final certificate, and, later, wrote a letter, in which he said that the certificate was not intended as a final decision upon any just rebate or offsets; but the Superior Court of New York held that it was nevertheless conclusive. There may, however, be circumstances in which a different decision would be given. A church was built from plans made by a certain architect, but the erection was superintended by an assistant. With the tacit assent of the church authorities, and of the architect, certificates for interim payments were given by the local superintendent, and payments were made on them, although the contract provided that certificates were to be given by the architect. When the church was finished, the architect, who had not visited it before, refused to give a final certificate, although the local superintendent was willing to do so. It was held, on a suit by the contractor for his pay, that the opinion of the architect was, under the circumstances, immaterial, as the local superintendent had been virtually accepted in his place.

Although the certificate of the architect is *prima-facie* evidence, it is not conclusive upon the parties unless the contract provides that it shall be, as is very often the case. When such a provision is made, nothing but evidence of fraud or mistake will be admitted to contradict it.

A slight mistake, however, if it can be corrected, will not invalidate the whole. An architect once certified that a certain piece of work was done, when, in fact, about forty-five dollars' worth of work was needed to complete it. The owner refused to pay anything on the certificate, alleging that it was invalid on account of the mistake. The Supreme Court of Illinois decided that this error did not impeach the certificate for fraud, or justify the owner in refusing to pay for, at least, the work actually done.

Where the contract so provides, the certificate of the architect is just as binding on the owner as on the builder.

In an Illinois case, a final certificate had been given by the architect, making certain deductions for imperfect work. The owners refused payment, on the ground that the work had not been done according to specifications. The court refused to admit evidence of this, saying that by the contract the right of the builder to recover rested on the condition of producing the final certificate of the superintendent, and, when produced, it must be held, in the absence of fraud, or of such serious mistake as would prevent the architect from exercising his real judgment, to be conclusive on both parties. "The condition precedent to the payment of the money having been performed by the production and proof of the architect's (superintendent's) certificate, nothing remains for the defendants to do, and it is wholly immaterial whether the work was well or ill done, so that the superintendent was satisfied."

In this last case, the certificate made deductions for imperfect work. It is often the case that it is more convenient for the architect to give a certificate, saying that the work will be complete, or satisfactory, when certain alterations have been made. Very frequently the owner does not care to have the specified alterations made, and both he and the builder are impatient to settle their accounts without them; while the architect, of course, does not wish to certify that a contract has been exactly fulfilled when he knows that it has not been, and a conditional certificate satisfies all parties. In such a case, there is a serious doubt whether the certificate is such as the ordinary contract requires; but it has been held in Illinois that, where a certificate had been given, saying that when certain slight alterations had been made the work would be acceptable, and there was evidence that the alterations had been made, and that no further objection had been raised, the acceptance was sufficient, and that no further certificate was necessary.

The architect is bound to give such a certificate as he thinks just, at the times mentioned in the contract, if either party requires it, and, if he unreasonably delays or withholds it, the builder is not obliged to wait for it.

*McAuley vs. Carter*,  
22 Ill. 53.

*See also, Korf vs. Lull*,  
70 Ill. 420.

*Taylor vs. Reun*,  
79 Ill. 181.

*Lull vs. Korf*,  
84 Ill. 225.

*Downey vs. O'Donnell*,  
86 Ill. 49.

*Finney vs. Condon*,  
86 Ill. 78.

*Snell vs. Brown*,  
71 Ill. 134.

*Mercer vs. Harris*,  
4 Neb. 82.

*Boettler vs. Tendick*,  
73 Tex. 488.

*Wyckoff vs. Meyers*,  
24 N. Y. 143.

*Mills vs. Weeks*,  
21 Ill. 561.

**Architect  
Must Give  
Certificate if  
Requested.**



An architect in England, on being applied to for a final certificate, gave the contractor a long list of things which, as he said, must be done before the contract would be completed. The contractor did them all, and came again after his certificate. The architect then presented him with another list of things which, as he said, were still lacking, but he added that, when these were done, the contract would have been completely performed. The contractor did all these, and applied a third time for his certificate, and the architect gave him still another list of trifling matters, which, he said, must be attended to before he could give it. The contractor, impatient at the delay, which had the appearance of being purposely made, sued to recover his final payment without the certificate, and was successful, the court holding that it was unreasonably withheld.

*Badger vs.  
Kerber,  
61 Ill. 328.*

Moreover, if the work is done according to the contract, the architect is bound to certify to that effect, although it may be unsatisfactory for other reasons. A curious case illustrating this point was decided in Illinois. A contractor had agreed to furnish stone for a building from a certain quarry, which had been recommended by the superintendent.

Under the contract, he was to be paid on presentation of a certificate from the superintendent, expressing satisfaction with the work and material. The stone changed color after being set in the wall; and the superintendent, after giving several certificates for payments on account, refused to give the final one, because of the defect which had shown itself in the stone. In a suit by the contractor for his money, which was resisted on the ground that the production of the certificate was, under the contract, an indispensable condition precedent to payment, the Supreme Court held that the refusal of the certificate was an act of bad faith in the superintendent, who was proved to have used the same stone in another building; and that the contractor was entitled to recover the contract price without the certificate.

Where work is supervised by a firm of architects, it has been

held in Illinois that the signature of one of the partners to a certificate, without objection from the other, is sufficient.

It is often claimed by builders that where extra work is done under a contract, the provisions of the contract as to the production of a certificate, as well as the other conditions of payment, apply only to the work done under the original agreement, and not to the extra work. This idea is entirely erroneous. It will be seen later that the courts uniformly hold that the contract conditions cover both the original and the extra work, except in case of changes so extensive that the work included in the original agreement can no longer be traced; and there are several decisions to the effect that the requirements of a contract as to certificates apply equally to work detailed in the specifications and to extra work or alterations.

Cases have already been referred to, which show that the certificate of an architect or superintendent is void, so far as it dispenses with the substantial provisions of the contract; and it has been held in several cases, where evidences of imperfect workmanship have shown themselves after the giving of the certificate, that it is not to be held as a waiver of defects which were not apparent upon mere inspection.

This is a point of great importance to architects, Builders, and owners also, usually assume that if the architect can once be induced to sign a final certificate, all the mistakes, malpractices and dishonest tricks which the contractor and his men have succeeded in concealing are thenceforth condoned, and, if they subsequently come to light, that it is the duty of the architect to pay for making them good.

It has been before shown that, although this notion has a certain foundation, it does not always hold good, even where the owner has paid the builder his contract price on the certificate; and where the payment has not been made on the final certificate, there should be no doubt that, if the owner knows of defects, or if any come to light, which were not known to the architect when the certificate was given, the owner is not only entitled, but bound, to withhold a suitable amount in the

Korf vs.  
Lull,  
70 Ill. 420.

**Certificate  
Required for  
Extras as Well  
as Contract  
Work.**

Barton vs.  
Hermann,  
11 Abb. Pr. 379.

Morgan vs.  
Birule,  
9 Blug. 672.

Westwood vs.  
Sec'y. State,  
11 W. R. 261.

final settlement, and that, if he willfully pays the builder for work which he knows has been omitted, or not properly done, he cannot afterwards hold the architect responsible for the amount, even though he may have innocently accepted the work and certified for payment.

*Loeffler vs.  
Froelich,  
36 Hun, 368.*

In a case in New York, where, under the contract, the production of the architect's certificate was a condition precedent to payment, the architect, after the building had been substantially completed, gave the contractor a certificate for the final payment on the understanding that he should make good some incompleteness in the work; but he afterwards revoked this certificate. The owner, the defendant in the case, refused to make payment according to the certificate, on the ground that an allowance of \$125 ought to be made him, by reason of the fact that the front and rear cornices were not constructed according to the specification. The question before the court was in regard to the effect of the architect's certificate. The counsel for the defendant conceded that "the revocation of the certificate produced no effect on its validity," and was commended by the court for doing so. The Court of General Term, in which the case was first heard, refused to admit evidence of the damage on account of the improper construction of the cornices, considering this to be shut out by the architect's certificate; and gave judgment for the builder. The defendant's counsel excepted to the exclusion of this evidence, and the case was carried to the Supreme Court on the exception. The Supreme Court held that the refusal of the General Term to admit the evidence was "substantial error," and reversed the judgment, saying that "While the plaintiff may recover on "a substantial compliance with his contract, of which the certificate of the architect is evidence, yet the defendant must "receive compensation for defects and omissions, by an allowance as a counter-claim in this action, and to that end he "must be allowed to prove his damages."

*Hartupsee vs.  
Pittsburgh,  
97 Penn. St. 107.*

So in Pennsylvania, where the contractor for the water-works of the city of Pittsburgh, who had agreed to build

pumping-engines in accordance with certain specifications, and, in a suit for his pay, instead of proving compliance with the specifications, offered evidence that the engines were doing the work required of them, and offered, also, the certificates of the supervising engineer for monthly payments, which were based on estimates of the apparent value of the work done, the inferior court ordered a compulsory non-suit, and was sustained by the Supreme Court, which held that "Where a plaintiff sues on a written contract to recover the stipulated price for work agreed to be done, the burden of proof is on him to show a substantial performance of his contract, or a waiver by the defendant"; and that "Where the contract provides that the materials used shall be of the best quality, the metals to be of a certain composition and tensile strength, the plaintiff must show affirmatively that the materials were of the required standard."

"The fact," the court said, "that the work was inspected during its progress by a mechanical engineer appointed by the defendant in pursuance of a provision in the contract, who reported from time to time that the work was progressing satisfactorily, and on whose certificates the plaintiff received large sums on account, does not constitute a waiver by the defendant of defects in quality which were not apparent upon mere inspection."

It will be observed that the doctrine laid down in these two cases differs widely from that accepted in Illinois, as shown in the decision quoted on page 100, and followed in several other cases in that State, so that the practice of different courts is, at least for the present, likely to vary on this point. In Virginia, a somewhat similar question has been decided entirely in the spirit of the New York and Pennsylvania decisions. A man in Richmond, named Iaeger, contracted with one Martin that Martin should furnish materials and build him a house in a workmanlike manner, and that, on the completion of the building, the price to be paid should be fixed by referees chosen by the parties to the contract. Several payments on

*See also,*  
*Bond vs.*  
*Newark,*  
*4 C. E. Gr. 376.*  
  
*Glacius vs.*  
*Black,*  
*50 N. Y. 145.*

*Iaeger vs.*  
*Bosseaux,*  
*15 Gratt. 83.*

*Iaeger vs.  
Boessieux,  
15 Gratt. 83.*

account were made as the work went on, and, when the house was completed, referees were chosen, who fixed the price to be paid.

Soon after this, and before the money had been paid, defects became apparent, proceeding, as the report says, "from shrinking of timber, showing that the work was executed in a defective and unworkmanlike manner." Iaeger refused to pay the price fixed by the referees, and Martin's assignee brought suit, on the ground that their award was final; but the Supreme Court held that "The valuation does not conclude the owner of the house, but he is entitled to compensation for the defects, and, in a suit by the assignee of the builder to enforce lien for the price for building the house, the owner will only be required to pay what the building was really worth."

Two cases in Nebraska have been decided rather in accordance with the Illinois view, but in one of them there is a slight flavor, and in the other a strong one, of unfairness, which would be likely to have a considerable influence on the result.

*Mercer vs.  
Harris,  
4 Neb. 82.*

In both these cases a certain Driscoll was the architect. In the first, he had made plans and specifications for a house for one Mercer, and was to superintend its erection. A contract for building it was made with Rose Bros., who afterwards assigned to Harris, who were to receive payment when the work was done "in a good and workmanlike manner, to the satisfaction and under the direction of said architect, to be testified by a writing or certificate under the hand of said architect." Driscoll gave the contractors orders, signed by himself, for instalments on the contract price, which Mercer paid. December 12, 1870, Driscoll gave the contractors a writing, addressed to Mercer, saying: "Please pay to Messrs. Rose Bros. the sum of six hundred and two dollars and sixty-six cents, balance in full of contract price." Mercer refused to pay on this document. Harris, as assignee of Rose Bros., brought suit, and the defendant tried to introduce as evidence a writing of Driscoll, dated January 28, 1871, being thus

nearly seven weeks subsequent to the other document, and stating the balance due on the contract to be \$507.55, with the following words added: "The above statement is correct, and includes all the moneys paid and due on account of the original contract. I have examined the work done, and, after making all due allowance for the seasoning of the material and settling of the building, etc., I find I cannot, without a decided detriment to my reputation, sign a certificate for the work being done in accordance to the plans, specifications, etc." (\$507.55 was the unpaid balance of the contract price, with no allowance for extras.)

The Supreme Court held that the order for the balance due was a sufficient certificate, being in the form which had been accepted by Mercer for previous payments; and that the subsequent statement of Driscoll could not be admitted; and as the contract made Driscoll the sole arbiter to decide between the parties to it as to the quality of materials and work, evidence from others as to the quality could not be received.

In the second case, Driscoll was architect of a school-house. The school trustees, in a suit for the contract price, alleged that the construction of the building was not according to the contract, and claimed that the final certificate of the architect, who had certified for the balance due, apparently in the manner required by the contract, was procured by fraud and collusion between the architect and the contractors. The court below ordered a verdict for the contractors, on the ground that the trustees could not go behind the certificate of the architect; and cited the case just described as authority for their decision; but the Supreme Court reversed the judgment, saying that the pleadings claimed fraud in the certificate, which they did not do in the other case, and that the way was thus opened to the defendants to show fraud by evidence which would have been properly excluded if the pleading had not raised the question.

Whether the production of the architect's certificate, where that is made by the contract a condition precedent to payment, shall be in general indispensable to recovery of the contract

*Mercer vs.  
Harris,  
4 Neb. 82.*

*Sch. Dist. vs.  
Randall,  
5 Neb. 408.*

**Decisions  
Vary as to  
Necessity of  
Certificate.**

price, unless fraud or collusion is shown, and, if the latter is alleged, whose fraud it must be which will relieve from the necessity of producing the certificate, and how the matter of the fraud is to be brought before the court, are all matters about which decisions vary, and it is hardly possible to extract any rule from the reports.

*Chism vs.  
Schipper,  
22 Vr. 1.*

A good view of the subject, showing both sides, may be obtained from the account of an important case decided in New Jersey.

Here the plaintiff agreed to build a house for the defendant, "agreeably to the drawings and specifications by Oscar S. T., architect, within the time aforesaid, in a good, substantial and workmanlike manner, to the satisfaction and under the direction of said architect, to be testified by a writing or certificate, under the hand of said architect," etc. It was further provided that in case of dispute arising as to the true construction or meaning of the drawings or specifications, the said architect was "to decide the same, and whose decision should be final and conclusive."

If the defendant requested alterations, additions or omissions, they were to be made, and a reasonable value was to be deducted from or added to the contract price. The defendant did order certain alterations, which were made, to the value of \$600, but it was alleged that the architect "wilfully and fraudulently" decided that the alterations were within the true construction of the drawings and specifications referred to in the contract, and that the plaintiff was not entitled to be paid the fair and reasonable value thereof, and wilfully and fraudulently withheld from the plaintiff, and refused to sign, the certificate required by the contract for the last payment called for thereby; and that the defendant had not paid the \$600.

The counsel for the defendant claimed that the production of the architect's certificate being, by the contract, a condition precedent to payment, and this condition not having been complied with, the action could not be maintained. The allegation of fraud on the part of the architect did not dispense with the

necessity of performance of the condition precedent. The builder might compel the architect to deliver the certificate, by a bill in equity, or might sue him for the fraud. He quoted the English case of *Milner vs. Field*, in which the court distinctly held that "Where, by the contract itself, the certificate of a surveyor is made a condition precedent to the right to payment, even if it be withheld by fraud, that is only the subject of a cross-action. The non-suit, therefore, was right." In the present case, the rule need not be so broad as this, since the fraud alleged was not charged against the defendant, but against the architect, who was not a party to the action. Under the most favorable rule for the plaintiff which the court could consider, the plaintiff must show, either, (1) performance of the condition precedent; or (2) that the defendant wrongfully prevented such performance of the condition precedent by his wilful or fraudulent act. The defendant's counsel referred to Addison on Contracts, where, in respect to building contracts, the principle is recognized that, where the certificate is withheld, there must needs be shown the collusion of the employer to entitle the builder to recover on the contract.

"Pleading fraud of A.," said the counsel, "as the ground of an action against B., without alleging B.'s participation in the fraud, is preposterous." In *Bowery National Bank vs. Mayor, etc.*, it was admitted that the contract had been performed to the very letter, and that the only reason the certificate was not given was that the Water Purveyor was enjoined from giving actual certificates by reason of another suit. In regard to the decision given by a New York court in the case of *Thomas vs. Fleury*, where it was held that if the certificate was fraudulently or unreasonably withheld, the builder might recover under other proof of performance, the defendant's counsel said that the reasoning of a New York court could have no force in New Jersey. Two plain remedies, he said, were open; the architect might be forced to give the certificate; or he, or the owner, or both, might be sued in tort for the fraud.

It may here be remarked that the case of the Bowery Bank

*Milner vs.  
Field,*  
5 Exch. 829.

*Bowery Nat.  
Bank vs.  
Mayor, etc.,*  
63 N. Y. 336.

*Thomas vs.  
Fleury,*  
26 N. Y. 26.



*vs. Mayor, etc.*, which the defendant's counsel cited in support of his position, was decided, on appeal to the Court of Appeals, in quite a different sense. The court held that, although the Water Purveyor was prevented by injunction from issuing the actual certificate, the injunction did not prevent the "assent of the skill and judgment of the Water Purveyor that the contract has been fully completed, but that it only stays his hand from expressing that conviction;" as if death, or sudden insanity, should prevent him from signing the certificate; and the judgment of the court below, dismissing the contractor's case, was reversed.

Continuing with our story; the counsel for the plaintiff began his side of the case by citing, with disapproval, Addison on Contracts, 2, Section 361, where it is said that "The employer is not responsible for any misconduct of the architect or surveyor in refusing to certify, not brought about by his instrumentality or interference"; and said, "The parties contract to be bound by the honest, and not the fraudulent decision of the arbiter, and his fraud relieves from the performance of a condition precedent requiring his decision or certificate." He quoted the decision in *Batchelor vs. Kirkbride*, where it was held that "fraud by the arbiters, though not in collusion with the defendant, entitles the plaintiff to recover"; and *Ormes vs. Beadel* (see page 132) in which it was decided that, "Where, by the contract, the award of the architect is final, and is fairly and impartially made, this court will not relieve against it, however severe may be its effects; but where the arbitrator is found guilty of unfairness or partiality, this court will relieve against his award." He cited also *Batterbury vs. Vyse*, where the court held that "the defendant, who employs the architect, does contract with the plaintiff that he will do his duty and act fairly."

The decision of the court on the case was delivered by the Chief Justice of New Jersey, who said:

"The case, in brief, is this: The plaintiff has done work for the defendant to the value of \$600, which work was

*Clarke vs.  
Watson,  
18 C.B. N.S. 278.*

*Batchelor vs.  
Kirkbride,  
27 Fed. Rep. 899.*

*Ormes vs.  
Beadel,  
2 Giff. 166.*

*Batterbury vs.  
Vyse,  
32 L. J. Ex. 177.*

*See also,  
Cook Co. vs.  
Harms,  
108 Ill. 151.*

"additional to that specified in the written contract; the money was payable on the certificate of the architect, whose decision was to be final; such architect fraudulently decided that the work in question was not additional, but was embraced in the contract, and the defendant, being notified of the facts, refused to pay the demand. As the demurrer confesses the truth of this statement, it will be observed that the defendant stands now before the the court, saying, 'I admit that this money is due for additional work; I admit that the architect fraudulently certifies to the contrary; and I claim that by a correct application of legal principles, I have the right to take advantage of the fraud, and to appropriate to myself the moneys that are its fruits.' The inquiry is: Does the law in reality justify this immoral attitude?" . . . "It was quite reasonable for these parties to say to their agent, 'decide honestly between us, and your decision shall be final'; but it was utterly unreasonable for them to agree to abide by such award if it were fraudulent." Judgment was ordered for the plaintiff.

The lay reader will observe that the point of the question lies in the relation of the architect to the two parties to the contract. The counsel for the plaintiff says: "The parties agree to be bound by the honest, and not the fraudulent decision of the architect"; and the Chief Justice strengthens this by assuming that the parties say to the architect: "Decide honestly between us, and your decision shall be final"; but it is at least conceivable, if not reasonable, that the architect is agreed upon as the final arbiter by the two parties for the express purpose of shutting off on both sides all claims of fraud; and because both parties are willing to accept without question his honesty, as well as his judgment. It is difficult to understand how the architect, in this case, could have been really guilty of any fraud in refusing to certify a claim for extras. Without collusion with the owner, which was not alleged, he could have derived no possible advantage from his refusal to give the certificate, and he certainly knew better

Taylor *vs.*  
Wreun,  
70 Ill. 181.

Coey *vs.*  
Lehmann,  
79 Ill. 173.

Lull *vs.*  
Korf,  
84 Ill. 225.

Starkey *vs.*  
De Graff,  
22 Minn. 431.

Neenan *vs.*  
Donoghue,  
50 Mo. 493.

Lynn *vs.*  
B. & O. R. R.,  
60 Md. 26.

B. & O. R. R. *vs.*  
Polly,  
14 Gratt. 447.

Willson *vs.*  
York, etc. R.R.,  
11 G. & J. 58.

B. & O. R. R.  
*vs.*  
Resley,  
7 Md. 297.

Hudson *vs.*  
McCartney,  
33 Wis. 331.

Fetz *vs.*  
Butterfield,  
54 Wis. 242.

Barney *vs.*  
Giles,  
2 N. E. Rep. 206.

Snell *vs.*  
Brown,  
71 Ill. 183.

Schenke *vs.*  
Kowell,  
7 Daly, 246.

Martin *vs.*  
Leggett,  
4 E. D. Smith,  
235.

Scott *vs.*  
Liverpool,  
1 Giff. 206.

Herrick *vs.*  
Belknap,  
27 Vt. 673.

- Nolan *vs.*  
Whitney,  
88 N. Y. 648.
- Doyle *vs.*  
Halpin,  
33 J. & S. 352.
- Anderson *vs.*  
Meislahn,  
12 Daly, 149.
- Smith *vs.*  
Alker,  
102 N. Y. 87.
- Woodward *vs.*  
Fuller,  
80 N. Y. 312.
- Bannister *vs.*  
Patty,  
35 Wis. 316.
- Bentley *vs.*  
Davidson,  
74 Wis. 420.
- Brunsdon *vs.*  
Beresford,  
1 C. & E. 125.
- Stadhard *vs.*  
Lee,  
113 Eng. C. L.  
389.
- Packard *vs.*  
Van Schaleck,  
58 Ill. 79.
- Fowler *vs.*  
Deakman,  
84 Ill. 130.
- Walsh *vs.*  
Walsh,  
11 Bradw. 199.
- Byrne *vs.*  
Sisters,  
16 Vr. 213.
- Mayor *vs.*  
Ackers,  
16 L. J. Ex. 6.
- Moffatt *vs.*  
Dickson,  
13 C. B. 543.
- McAndrews *vs.*  
Tippett,  
10 Vr. 109.
- Kirtland *vs.*  
Moore,  
1 Cent. Rep. 466.

than any one else what work was really included in the contract. Moreover, even if there was a preponderance of evidence that work which he believed to have been included in the contract was really extra, there was still nothing fraudulent in his insisting on his own opinion.

One of the justices, Magie, dissented from the opinion of the court, and said: "A count on such a contract must show performance of the condition precedent, or a valid excuse for non-performance. . . . It is insisted, however, that an impossibility of performance, occasioned by the death of the architect, would excuse performance; and that, on similar grounds, an impossibility occasioned by his fraud will also excuse. It is a familiar doctrine that one who has contracted to do an act will be excused, if performance has become impossible by the act of God, or of the law. But this doctrine has never been extended to impossibilities not created by *vis major*. . . . Where the parties expressly stipulated for an architect's certificate, it is obvious that they had in contemplation his conduct, including his ability to do the act; his willingness to do it, and his honesty in doing it. . . . That the inability or unwillingness of the architect to make the certificate will not excuse its production has been established in the analogous case of insurance contracts, where the insurers' liability does not arise until the production of a certificate by some person designated or described in the contract. . . . It is urged that the architect in such cases occupies a position like that of an arbitrator, whose award may be set aside for fraud. But it is settled that an award cannot be thus dealt with except where the submission has been made a rule of court, in which case the court exercises an equitable jurisdiction." . . . The judge cited 2 Langdell, 1087; Addison on Contracts, Section 336; Buller, N. P., 164; Hotham *vs.* East India Co., 1 L. T. R., 638; 1 Benj. Sales, 105, and note; and went on to say: "If, therefore, the owner has procured or induced the architect to fraudulently withhold the required certificate, his liability will arise without

"its production, for his act has thus prevented performance, "and he will not be permitted to thus defeat his liability." . . . "There has been some vacillation in the English decisions with respect to this doctrine. In *Milner vs. Field*, 5 "Exch. 827, the withholding of such a certificate by fraud and "collusion with the owner was held only to give a right to a "cross-action. In *Clarke vs. Watson*, 18 C. B. N. S. 278, it "was intimated that if an owner colluded with a surveyor to "withhold such a certificate, he could not shelter himself from "liability under such wrongful act. But in *Batterbury vs. "Vyse*, 2 Hurlst. & C. 42, a declaration on a building contract "which stipulated for the production of the architect's certificate before liability should attach was held to be good, "because it averred that its non-production was caused by the "neglect of the architect in collusion with and by the procurement of the owner. The doctrine of the case last cited "must, in my judgment, prevail, for it imposes a just obligation on the owner, and prevents his gaining advantage from "his own wrong. . . . It is proper to point out that the case "before us does not show the relation between the owner and "the architect. When the latter is so employed as to become the agent of the owner with respect to the building, a "new element is introduced, which may require a different "result. The adverse cases in other courts show, in some "instances, the existence of such a state of affairs."

The differing opinions of the two judges reflect in an interesting manner the division which exists between what we may call the two schools of judicial science in regard to matters of this kind. Of these, the stricter one, which is exemplified in Judge Magie's opinion, has perhaps more authority in England, and the more liberal one in this country; but the records of all our States show that judges, probably influenced by circumstances which do not appear on the record, choose precedents sometimes from cases of one class, and sometimes from those of the other, so that, although the judgments are undoubtedly right, the principles on which they are based

*Wells vs. Calnan*,  
107 Mass. 514.

*Roumage vs. Ins. Co.*,  
1 Gr. 110.

*McMahon vs. N. Y. & E. R. R.*,  
20 N. Y. 463.

*Barton vs. Hermann*,  
11 Abb. Pr. N. S. 378.

*Wangler vs. Swift*,  
90 N. Y. 38-43.

*Kane vs. Stone Co.*,  
39 O. S. 1.

*Vandewerker vs. Central R. R.*,  
27 Vt. 130.

*Baasen vs. Baehle*,  
7 Wis. 516.

*McCarren vs. McNulty*,  
7 Gray, 139.

*U. S. vs. Robeson*,  
9 Pet. 319.

*Leonard vs. House*,  
15 Ga. 473.

*Smith vs. Boston*,  
36 N. H. 458.

*Dingley vs. Greene*,  
54 Calif. 333.

*Sutherland vs. Morris*,  
45 Hun. 259.

*Downey vs. O'Donnell*,  
92 Ill. 559.

*Ely vs. Ely*,  
80 Ill. 240.

*Butler vs. Tucker*,  
24 Wend. 447.

**Trustees vs.**  
 Lynch,  
 5 Gilm. 521.  
**McAvoy vs.**  
 Long,  
 13 Ill. 147.  
**Atkins vs.**  
 Barnstable,  
 97 Mass. 428.  
**Hanley vs.**  
 Walker,  
 79 Mich. 607.  
**Langdon vs.**  
 Northfield,  
 42 Minn. 464.  
**Dinsmore vs.**  
 Livingston,  
 60 Mo. 241.  
**Munroe vs.**  
 Butt,  
 8 El. & B. 738.  
**Wadsworth vs.**  
 Smith,  
 6 L. R. Q. B. 332.  
**Richardson vs.**  
 Mahon,  
 4 L. R. C. P. 486.  
**Sharpe vs.**  
 St. Paul's,  
 29 L. T. N. S. 2.  
**Dobson vs.**  
 Hudson,  
 1 C. B. N. S. 652.  
**Kimberley vs.**  
 Luck,  
 13 L. R. Eq. 1.  
**Pawley vs.**  
 Turnbull,  
 3 Giff. 70.  
**Owens vs.**  
 Beadel,  
 2 Giff. 166.  
**Milnet vs.**  
 Field,  
 5 Exch. 829.  
**Clarke vs.**  
 Watson,  
 18 C. B. N. S. 278.  
**Poussard vs.**  
 Spiers,  
 1 Q. B. Div. 410.

are somewhat indeterminate. There will be many illustrations of the application of these opposite principles in the following pages, but for the present it will be sufficient to quote what happen to be very clear and intelligible statements of the views to which they lead upon the single matter now under consideration — the binding force of the architect's certificate.

Messrs. Jenkins and Raymond's excellent little English book on Building Contracts says, in summing up the subject of certificates: "Pausing here to take a glance at the topic we have just been discussing, and to sum up the obligations and duties imposed on the parties by the law, we may observe that when the architect is to testify his satisfaction by certifying, nothing short of this will be of any avail to the contractor; the work may be well and correctly done, the employer may be perfectly contented with the manner of its execution, it may even be completed to the satisfaction of the architect, but nevertheless, unless such satisfaction be evidenced by the production or proof of the certificate, all attempts on the part of the contractor to recover any consideration in a court of justice, must, in the absence of impropriety on the part of the architect, be fruitless. But though the architect is the sole arbiter of the mode in which the contractor has acquitted himself in the performance of the contract; though on this point the parties are bound by his decision, and must submit to it without any appeal; and though he may be invested with a wide discretion and with considerable authority, his power is not absolute; he is not a despot but a judge, and as such the law ordains that he should be capable, that he should deal fairly between the parties, that he should not be negligent of his duties, and that he should not be guilty of misconduct or fraud in administering the power with which he is entrusted; and should the contractor succeed in making out that the certificate is withheld by the architect in consequence of any or either of these delinquencies he will be entitled to the assistance of the Court." More briefly, the same authors sum up in another place the law on the subject by saying, "If it is agreed that payments

to be made to a contractor shall only be considered due, provided the certificate of the architect should first be obtained, absence of the certificate is an answer to an action at law, or to a bill in equity."

This view of the law is at least logical; if the parties to the contract agree to be bound by the certificate of a given person, given in a certain way, they cannot escape from the consequences of their agreement, except by claiming and proving fraud on the part of that person. With us, however, Justice, at least in some courts, is permitted to open one eye when contemplating such cases, and a rule is adopted which, if not so logical, is more amiable. In a case in New York, which has been much cited as a precedent, the Supreme Court said: "The parties to building contracts apparently differ most widely in reference to their obligations. The builder seems to suppose that while he adheres generally to the plan which is prescribed for him, he is at liberty to disregard minute and unimportant particulars; while the owner imagines that a departure from such plan in any respect, although it may be the effect of accident, and of no possible injury to him, exonerates him from the obligation to make any payment which is in terms made dependent upon the full performance of the contract. Both are wrong. . . . A substantial compliance, without any intentional variation, should in all cases be considered as a full performance of a condition, whether precedent or consequent." In this case, the architect had not given such a certificate as the contract required, but the contractor was allowed to recover on other proof that the contract had been substantially performed.

The uncertainty in regard to the conclusive authority of the certificate which is shown in the account of the preceding cases may, and should, be avoided by a special provision in the contract itself. It is, of course, important to the interest of architects and owners that the certificate should be regarded simply as an expression of the architect's opinion that the contract has been complied with, and not as a guaranty, or a

*Stover vs. Gordon,*  
3 M. & S. 308.

*Worsley vs. Wood,*  
6 T. R. 710.

*Martin vs. Leggett,*  
4 E. D. Smith, 255.

*Baron de W. vs. Mellier,*  
16 L. R. Eq. 554.

*Morgan vs. Birnie,*  
9 Bing. 672.

*Clark vs. Pope,*  
70 Ill. 123.

*Mills vs. Weeks,*  
21 Ill. 561.

*Cent. Mil. Co. vs. Spruck,*  
24 Ill. 587.

*Wallace vs. Holmes,*  
36 Ill. 156.

*Ewing vs. Fiedler,*  
30 Bradw. 202.

decree of absolution to the contractor for all the sins which he might have succeeded in hiding temporarily from view. Under the first aspect, the certificate is open to correction, if subsequent discoveries should reveal the hidden defects, and the owner is not obliged to pay for work omitted, or improperly done, no matter what the architect may have certified in regard to it; while, under the second view, the certificate cannot be called in question, except on the ground of fraud on the part of the architect, and the owner must pay the certified amount, and trust to getting damages from the architect if the latter should be proved to have been guilty of negligence or gross want of skill in making his certificate. It seems to be the tendency of the law to regard the certificate, where the contract leaves its authority in doubt, as an opinion merely, but it is best to define its force precisely by providing in the contract that the certificate shall not exempt the contractor from making good any work which may afterwards be discovered to have been improperly done, or not in accordance with the plans and specifications; or, more briefly, by describing the document as "the written certificate of the architect that the work to the stage in question has, in his opinion, been done in the manner herein agreed."

It occasionally happens that, under the contract, certain deductions are due from the contract price, at the completion of the building, which are uncertain in amount, or which the owner, as the architect supposes, may not wish to claim. For example, it happens, in perhaps the majority of cases, that the building is not completed on the day appointed in the contract, and if, as is usually the case, a forfeiture is provided by the contract for every day's delay, it becomes a delicate matter for the architect to decide how much deduction shall be made from the last payment to the builder. As will be seen later, the owner is only entitled to deduct from what he had agreed to pay the builder the actual loss which he has suffered by the delay, in the shape of the extra house-rent which he may have been obliged to pay, or something of the sort, no matter what

the contract may have set as the forfeiture; and it is next to impossible for the architect to fix this damage, even if he is entitled by his position to do so. The consequence is that if he gives his certificate without taking such deductions into consideration, he incurs the enmity of the owner, who finds it more difficult to make terms with the contractor, after the latter has been fortified with the architect's certificate; and if he makes his deductions on these accounts too large, he gives the builder a just right to complain, and perhaps finds that the validity of the entire certificate has been destroyed.

**Uncertainty  
of Deduc-  
tions to be  
Made.**

Some of the griefs which arise from the failure of the builder to follow the exact proportions of the drawings are even more difficult to adjust. The rule is that the owner, in such cases, is entitled, if he does not choose to insist on having the error corrected, to deduct from the contract price the difference between the market value of the house as it actually is, and that which it would have had if it had been carried out in strict accordance with the drawings. There is some doubt whether the architect is the proper person to make this estimate, and it has been held in one case that a real-estate agent should be the one to make the valuation; but the architect is, apparently, bound to call the attention of the owner to the fact that such defects exist, for which a deduction may lawfully be made.

Hence the final certificate is, to some extent, provisional, and the architect should be careful to reserve in it the rights which the owner, under the contract, may insist upon if he chooses.

**Final Certifi-  
cate Really  
Provisional.**

Where a contract partly executed is abandoned by agreement of the parties, or by the fault of one of them, or where such alterations and changes have been made as to obscure totally the original agreement, it sometimes happens that the contract is treated by a court as no longer existing, and the builder is held to be entitled to recover *quantum meruit* for his work and materials; that is, what they can be proved to have been really worth, without regard to the contract price

**Cases of  
*Quantum  
Meruit*.**



for them. In such a case, it becomes important to know whether it is still necessary to produce the architect's certificate, in order to recover payment on the new basis. The law appears to be that it is not necessary, in such cases, to produce the certificate; but it has been held, even in a suit on *quantum meruit*, where the architect had pointed out certain defects, and the builder claimed to have remedied them, that he must show the architect's certificate to the effect that they had been satisfactorily corrected.

Where certificates are to be based on measurements, as is frequently the case with interim certificates, the contractor, if he wishes, is entitled to be notified, and to be present when the measurements are made; and, in general, anything like an appearance of disingenuousness or partiality should be avoided. In cases where either the owner or contractor has some fancied grievance against the other, it is particularly necessary to preserve an attitude of judicial fairness; and it has been held that, "Where the architect knows that there is a misunderstanding between the parties, it would be well for him to give notice of the time and place where he will render a decision."

Like all the other conditions of a contract, the one requiring the production of the architect's certificate as a condition precedent to receiving payment, may be waived by the party for whose benefit the provision is particularly intended; and the waiver may be express, by agreement between the parties; or implied from certain acts or conduct on the part of the one entitled to make the waiver.

As it is often very much for the interest of the builders to be able to dispense with the architect's approval of their work, waiver of it on the part of the owner is very frequently claimed, and sometimes sustained. It has been held, for example, where a building had been completed and occupied, apparently without objection from the architect, although he had not given his certificate, that the occupation of the building was evidence that the owners were satisfied of the completion

*Yeats vs.*  
*Ballantine,*  
56 Mo. 530.

*Hanley vs.*  
*Walker,*  
79 Mich. 607.

*McMahon vs.*  
*N. Y. & E. R.R.,*  
20 N. Y. 463.

*Korf vs.*  
*Lull,*  
70 Ill. 420.

*Clark vs.*  
*Pope,*  
70 Ill. 123.

*Vermont St.*  
*Church vs.*  
*Brose,*  
104 Ill. 207.

*Haden vs.*  
*Coleman,*  
73 N. Y. 567.

**Waiver of  
Certificate.**

*Blethen vs.*  
*Blake,*  
44 Cal 117.

*Bannister vs.*  
*Patty,*  
35 Wis. 316.

of the contract, without the evidence of the certificate, and that payment was due; and in a New York case, even where the architect had refused to give a final certificate, by the direction, as he said, of the owner, the fact that the owner had moved into his house, and had given other reasons for believing that he considered the contract as completed, was held to constitute a waiver of the condition requiring the architect's certificate, so that the builder was entitled to recover payment without it.

It would be, however, quite incorrect to suppose that mere occupancy of a building constituted a waiver of any of the requirements of an ordinary contract. Many examples will be given hereafter to show that this is not the case; and the implied waiver of the certificate in *Smith vs. Alker* depended upon circumstances additional to simple occupancy.

Where certificates for payments on account are to be given, as well as the final certificate, it has been decided that if interim certificates in a form not strictly according to the contract have been accepted without question, and payments made on them, a final certificate in a similar form is valid; but where the interim certificates have not been given at all, but payments have been made without them, it has been held that this did not waive the necessity for procuring the final certificate, or set aside one which had been procured, but which was not in accordance with the contractor's wishes.

*Smith vs.*  
*Alker,*  
102 N. Y. 87.

**Mere Occu-  
pancy not  
Waiver.**

*Bloodgood vs.*  
*Ingoldsby,*  
1 Hlt. 388.

*Mercer vs.*  
*Harris,*  
4 Neb. 82.

*Crumbleh vs.*  
*Wilmington*  
*R. R.,*  
5 Del. Ch. 270.

*Barton vs.*  
*Hermann,*  
11 Abb. Pr.  
N. S. 378.

## CHAPTER XV.

### THE CONTRACT.

**Relation  
Between  
Owner and  
Builder  
Fixed by the  
Contract.**

**T**HE relation between the builder and the owner is formed exclusively by the contract. This alone defines what the builder is to do for his employer, and how much, and in what manner, and at what time, he shall be paid for doing it.

A contract may be a very informal affair, and may even be implied from certain actions of one party or the other; but, without a contract of some kind, neither party is obliged to do anything for the other.

**Written,  
Oral and Im-  
plied Con-  
tracts.**

Contracts, in general, are of three sorts, written, oral, or parol, as they are sometimes called, and implied. In the first sort, each party signs a writing, containing what both agree to do; in the second sort, the parties verbally agree what one shall do, and the other pay for the service; and in the third sort, one party asks the other to do something, or, after the thing has been done without his asking, accepts the benefit of it; and a promise to pay a reasonable price for what has been done is thereby implied.

Practically, most contracts combine the features of at least two of the sorts. Few written contracts, and still fewer oral ones, are so full as to describe everything that each party is to do, and some of the provisions which the parties really intended have to be implied from various circumstances, such as local custom, previous transactions between the parties, legal maxims laid down for the purpose of meeting such cases, or many other things.

Of the three sorts, the written contract is commonly supposed

to be the most binding. In reality, it is no more binding than any of the others, but, as there can be no dispute about terms laid down in black and white, and signed by both parties, while two persons will rarely agree as to what was said in making an oral contract, it is usually the most easily enforced. Moreover, as there is a certain solemnity attached to the signing and delivery of a written contract, it is always presumed in law that the written document is the final quintessence and conclusion of all the oral negotiations which have preceded it, and expresses the matured agreement and understanding between the parties.

**Written  
Contracts.**

For this reason, as has been before mentioned, (Page 10), testimony as to oral conversations and agreements, which contradict a subsequent written contract, or even a very informal written memorandum of a contract, is generally excluded by courts. Innumerable examples to illustrate this point can be found in the law reports, as nothing is more common than for people, when brought to account for not fulfilling their agreements, to endeavor, unsuccessfully, to introduce evidence to show that they did not really mean what they signed their names to, but something else.

The contract between the builder and the owner may be, in some cases, a contract for employment simply, in which the mechanic works by the day or hour, and the owner either agrees to pay him certain wages, or promises, by implication, to pay him a reasonable compensation; or the agreement may be for the builder to furnish materials as they are wanted, and engage men, who work by the day at whatever the owner may wish them to do, and are paid for their time by the owner, although usually indirectly through the builder, who charges a profit on the wages actually paid, to compensate him for his trouble in hiring and supervising the men. A contract of this kind differs materially, in the method of enforcement, and the responsibility which it imposes on the parties, from one in which the builder agrees to do a certain work for a fixed sum; but details on this point will be given later.

**Contracts  
for Employ-  
ment.**

It was said above that if a person does a service for another,

**Implied Contracts.** without being asked to do it, and the person for whom the thing was done accepts the benefit of it, a contract for doing the work is implied, under which the one who derives benefit is bound to pay a reasonable price for the work.

Such an implied contract would be subject to modification by any more definite agreement under which the work might have been done. For example, where a written contract provides that extra work shall not be paid for unless ordered in writing, the owner is not obliged to pay for extra work not so ordered, even though he may derive benefit from it; and there are various legal presumptions under which a person is considered as having intended to render services without expectation of being paid; as where children work for their parents; or a wife for her husband; or where persons employed work occasionally overtime.

**Blount vs.  
Guthrie,  
99 N. C. 93.**

Cases of this sort are often difficult to decide. On the one hand, is the maxim of law that no one can make another debtor to him against his will; and on the other, is the natural feeling that a person who innocently does another a service should receive what the service is worth to the one for whom it was done, even though he may not have asked for it. A good case for illustration is that of a plumber in North Carolina, who made a sub-contract with a builder for the plumbing of a house. The owner discharged the builder for drunkenness, before the plumbing work was done. The plumber went on with his work, and, when it was done, sued the owner for the price. The owner was proved to have seen the work going on, and to have given some directions about it; and, although it seemed that money enough to pay the plumber, under his sub-contract, had been paid over to the builder, the Supreme Court held that the owner might, if the jury should think that the circumstances warranted it, be required to pay the plumber at least the value of the work done by him after the discharge of the builder, on the ground that "Where one stands by in silence, "and sees work done or materials furnished for work done "upon premises belonging to him, of which he accepts the "benefit, a promise to pay the value thereof may be inferred."

## CHAPTER XVI.

### FORMAL CONTRACTS.

**A**S distinguished from implied contracts, a formal contract may be defined as consisting of a proposal and acceptance.

**Proposal  
and Accept-  
ance.**

The proposal may be made by one party, and accepted by the other, by separate acts, or the agreement as to what each is to do may be signed by both, this constituting virtually a simultaneous proposal on the one hand, and acceptance on the other, of all the conditions of the agreement.

Where it is desired to make a contract by means of a proposal and its acceptance, certain precautions must be observed by both parties. In all cases, the party making the proposal must be careful to have it include everything that he means to insist upon, for the reason that its acceptance by the other party binds both to its exact terms, without variation or reservation of any kind; and a person who, having received a proposal which seems to him favorable, desires to take advantage of it, must accept it at once, and unconditionally.

Just how quickly the acceptance must follow the proposal, and how much opportunity shall be given to the one making the proposal to retract or modify it, are questions over which courts have spent much time. Something depends upon the circumstances attending the offer, and what would be a reasonable time in one case might not be so in another. A man once wrote an offer to engage a person as trimmer in his millinery shop, asking for a prompt reply. The letter was received by the one to whom it was addressed, on March 22.

**How Soon  
Proposal  
Must be Ac-  
cepted.**

The next day, March 23, she answered by postal card, accepting the offer. She gave the postal card to a boy to mail, but he neglected to mail it until March 25. The place had then been given to some one else, and, on the suit of the one to whom the offer was first made, to enforce the agreement contained in the letter and its acceptance, it was held that the acceptance was sent too late, and that the milliner was not bound by his offer.

*Haughwout vs.*  
*Boisaubin,*  
3 C. E. Gr. 315.

**Acceptance  
by Letter.**

*Adams vs.*  
*Lindise I,*  
1 B. & Ald. 681.

*Dunlap vs.*  
*Higgins*  
1 H. L. Cas.  
381, 400.

*Newcomb vs.*  
*De Roos,*  
2 E. & E. 271.

*Harris Case,*  
7 L. R. Ch. 587.

*Bragdon vs.*  
*Metrop. R. R.,*  
2 App. Cas. 691.

*Household Ins.*  
*Co. vs.*  
*Grant,*  
4 Ex. D. 216.

*Byrne vs.*  
*Van Tienhoven*  
5 C. P. D. 344-8.

*Fox vs.*  
*Turner,*  
1 Bradw. 153.

*Mactier vs.*  
*Frith,*  
6 Wend. 103.

*Vassar vs.*  
*Camp,*  
1 Kernan, 441.

Where it is specified in the offer that it shall be open "until" a certain day, it has been held in New Jersey that acceptance on that day was sufficient, unless the offer had been definitely withdrawn before acceptance.

Where acceptance is made by letter, it is of importance to know whether the acceptance, and with it the contract, is complete on the mailing of the letter, or not until it has been received by the party making the proposal, but decisions in different States vary on this point. The English rule, which is followed in New Jersey, and seems to be also adopted in New Hampshire, Illinois and Mississippi, is that "The acceptance of a proposal by letter is complete on the delivery of such acceptance to a messenger, to be carried to the proposer, and the contract is binding from that point of time; so that, if B. gives to a messenger, for the purpose of delivering to A., the acceptance of a proposition made by A., simultaneously with the time that A. dispatches a messenger to notify B. that the proposition is withdrawn, the acceptance is complete, and the contract binding."

Where the letter of acceptance is sent by mail, instead of being given to a messenger to carry, it seems to be the rule that the dropping of a letter in the post-office, or in a letter-box, is equivalent to giving it to a messenger, and that from that time, the contract is binding.

In New York, the law on the subject must be considered as doubtful. Some of the decisions appear to favor the English view, and others not. It was held by the Supreme Court in one case that an acceptance by letter was not complete on the

mailing of the letter, when it was not shown that the postage on the letter was paid, but it has also been held that a contract by letter is completed the instant a letter accepting the proposal is mailed, and is valid and binding whether the letter of acceptance is received or not.

In cases where there appears to have been a discrepancy between decisions in the same State on these points, it will probably be found that something in the proposal, or in the previous negotiations between the parties, gave reason to suppose that it was intended that the acceptance should be made under certain conditions of time. In such cases, the court will always give effect to the intention of the parties, without regard to abstract principles, which are only applied in the comparatively infrequent cases where it cannot be ascertained that there was any understanding between the parties on the subject.

In Massachusetts, it appears to be well settled that the contract is not complete until the letter of acceptance is received; and, in consequence, the person making the proposal is entitled to correct it, or withdraw it, until he receives the reply.

In the Federal courts, the same doctrine is held, in respect to letters, as in Massachusetts.

Where telegrams are sent, instead of letters, there are further variations in the decisions. In the Federal courts, although an acceptance by letter is not binding until it is received by the person addressed, an acceptance by telegraph has been held to be complete as soon as the message was furnished to the telegraph office for transmission. In New York, on the contrary, although acceptance by letter has been held to be complete on the mailing of the letter, it has been decided that acceptance by telegraph is not binding until the telegram is received.

Whether the person making the proposal is always at liberty to withdraw it until it has been accepted appears to be somewhat doubtful.

The rule is that, until the offer is accepted, it is an offer only,

**Halleck vs.**  
Com. Ins. Co.,  
2 Dutch. 278,  
3 Dutch. 643.

**Taylor vs.**  
Merchants'  
Ins. Co.,  
9 How. 390.

**Northampton**  
*vs.*  
Tuttle,  
11 Vr. 478.

**Britton vs.**  
Phillips,  
24 N. Y.  
Sup. Ct. 111.

**Lewis vs.**  
Browning,  
130 Mass. 173.

**McCulloch vs.**  
Eagle Iron Co.,  
1 Pick. 278.

**The Palo Alto**  
*etc.*  
2 Ware, 343.

**Acceptance**  
**by Tele-**  
**graph.**

**Minn. Oil Co.**  
*vs.*  
Collins Lead  
Co.,  
4 Dill. 431.

**Trevor vs.**  
Wood,  
36 N. Y. 307.

**Withdraw-**  
**al of Offer.**



and may be withdrawn or modified by the party making it; but there would often be circumstances to indicate that a reasonable time was to be allowed for considering the offer. Where a proposal is made by letter, it is considered that it is, in any case, open until the letter is received; so that if a man receives a letter, making a certain proposition, and answers it at once, accepting the offer, the person who made it is bound by it, even though he may have sent off a second letter immediately after the first, withdrawing the offer. If, however, he should telegraph his withdrawal, so that it reached the proper person before the reply accepting the offer was sent, the proposition would be cancelled, and neither party would be bound.

**Proposal  
Must be Ac-  
cepted as  
Made.**

In any case, a proposition must be accepted as made. A conditional acceptance is no acceptance at all. It is very common for architects and other people, after receiving and considering bids for a building, to send word to the lowest bidder that his proposition is "accepted, on condition of signing a satisfactory contract." An acceptance of this sort does not bind the person who made the proposition, and if he chooses to reply that he will not sign any contract, or that he withdraws his bid, or if he makes no reply at all, he is no longer held to his offer, and a subsequent unconditional acceptance of it does not bind him.

To use the words of an Illinois Court: "A proposal to "accept an offer, on terms varying from those proposed, "amounts to a rejection of the offer, and a substitution in its "place of a counter proposition, which cannot become a con- "tract until assented to by the first proposer. The original "offer thereby loses its vitality, and is no longer pending "between the parties, and it becomes an open proposition again "only when renewed by the party who first made it; hence, "the party who submitted the counter proposition cannot, "without the consent of the other, withdraw or abandon the "same, and then accept the original offer, which he has once "virtually rejected."

Even where a man, having received a verbal proposition,

*Fox vs.  
Turner,  
1 Bradw. 153.*

*Dwight vs.  
Ludlow,  
128 Mass. 280.*

*Eggleston vs.  
Wagner,  
46 Mich. 610.*

*Thomas vs.  
Greenwood,  
69 Mich. 215.*

*Falls Mfg. Co.  
vs.*

*Broderick,  
12 Mo. App. 378.*

*Brechelsen vs.  
Coffey,  
15 Mo. App. 80.*

*Shickle vs.  
Chouteau,  
84 Mo. 161.*

*Hughes vs.  
Clyde,  
41 O. S. 239.*

wrote a letter accepting it, and stating the terms as he understood them, and asking the party addressed to acknowledge his acceptance in writing, it was held that this did not constitute a contract, but only a proposition for a contract.

*Hough vs.  
Brown,  
19 N. Y. 111.*

In the same way, where the rather common trick is played of accepting a contractor's bid, for a few dollars less than his proposition, the contractor is in no way bound by the acceptance, but is, on the contrary, released by it from his original proposition.

Even an innocent mistake in the acceptance invalidates it. The Managers of the Corporation of the Maine Industrial School for Girls once appointed a building-committee of five members, with instructions to advertise for proposals, and to take the necessary measures for the erection of a school-building. The building-committee did so, asking for proposals for labor and materials, according to plans and specifications. In answer to this advertisement, the following proposal was sent.

*Howard vs.  
Ind. Sch.  
78 Me. 230.*

"HALLOWELL, September 26, 1884.

TO THE BUILDING COMMITTEE OF INDUSTRIAL SCHOOL:—

We propose to put up the superstructure of said building as per plans and specifications or instructions of your architect, E. E. Lewis, of Gardiner, Maine, for the sum of forty-five hundred and fifty dollars.

JOHN HALL, *Carpenter.*  
HOWARD & CHURCH, *Masons."*

On the same day the building-committee had a meeting, with three members present. They opened the bids, and found the one described above to be the lowest. The record of the meeting then proceeds as follows:

"And the contract was awarded to Hall, Howard and Church, for \$4,525.

"Voted, that the committee require a bond from the contractors to the amount of the contract, for fulfilment; also forfeiture for delay in completing the work."

A controversy subsequently arose about the building, and the

Supreme Court of Maine held that no contract existed between the parties.

Here, not only was there an error in the vote as to the amount of the bid accepted, but the action of the committee in requiring a bond from the contractor introduced a condition which was not, as the testimony showed, either suggested in the original bid, or subsequently accepted by the contractors.

*Hughes vs.*  
*Clyde,*  
41 O. S. 339.

The same rule holds good against the builder. The selectmen of a village once advertised for bids for building a town-hall, according to certain plans and specifications. One Hughes sent in a bid, which was accepted. Hughes then drew up a contract, and the selectmen drew up another, but each party refused to sign the contract as drawn up by the other. The selectmen then indefinitely postponed the whole matter, and Hughes sued the village for damages. It was not shown that Hughes ever offered to sign any contract limited to the terms expressed or implied in the advertisement, plans, specifications, bids and vote of acceptance, and the court held that the acceptance of a bid legally made, under the statute regulating the undertaking of public works by villages, only entitled the bidder to a contract according to those terms; and that, as Hughes never offered to execute such a contract, and the village did not waive its execution, he had no right of action.

Architects will perceive, from these examples, that it is very necessary, for their client's interest, as well as for their own, and that of the builders who bid on their work, to explain, as far as possible, in the specifications on which the builders base their estimates, all the conditions, as to time of completion, giving bonds, etc., upon which the owner wishes to insist.

If this is done, the bids will be made understandingly, and an acceptance of any one will bind the contractor making the offer to all the stipulations on which his bid was based.

**General  
Conditions.**

In practice, this is usually effected by prefixing to the specifications for every part of the work which is intended to form the subject of a separate contract a printed sheet of General

Conditions, which forms a part of the specification, and contains all the stipulations in regard to bonds, time of completion, payment for permits and water for building, compliance with building regulations, maintaining lights and guards, and so on, which the contractors will be expected to conform to.

As the bids are always based on the specification, which includes the general conditions, a simple acceptance of a bid establishes a valid contract with the bidder, by which he is held to all the terms of the general conditions, as well as to the other details of the specification.

To say nothing of the greater fairness of showing the contractors, before they make their bids, everything that will be required of them, it is often for the advantage of the owner to be able to accept promptly and definitely a particularly favorable bid without giving an opportunity for its withdrawal, such as would be afforded by any conditional acceptance; and, if the specifications on which the bid was based contained proper general conditions, there is no risk in doing so, as the contract thus made is perfectly binding, and the additional stipulations of a more formal document, such as those providing for insurance, or regulating the times of payment, are usually more for the benefit of the builder than of the owner.

Where, however, such general conditions have not been incorporated in the specification, the unconditional acceptance of a bid forms an equally valid agreement, to which the owner is bound, but which binds the contractor only to complete his work within what a jury may consider a reasonable time, without regard to the owner's wishes on the subject, and leaves uncertain various other matters of great importance to the owner.

Whether the architect is entitled, by his relation to the owner, to accept bids for the work is very doubtful; and, although no case in which just this point is involved appears to have been decided in our courts, it seems quite probable, in the light of the decisions as to the architect's authority as agent for the owner in other respects, that an architect who, as not unfrequently happens, accepts unconditionally a favorable bid

**Contract by  
Acceptance.**

**Acceptance  
by Architect  
for Owner.**

without consulting the owner, might find himself in an uncomfortable predicament if the latter should choose to repudiate the act of his too zealous adviser. At the same time, as it is often of great advantage to the owner to have propositions made to the architect accepted on the spot, it is desirable that the architect should be specially empowered by the owner to act for him in this way, either in general or for particular occasions, or under such limitations as may be agreed upon; and the architect should in such cases be careful to show that he is acting for the owner, and not for himself, by using some such form as "I am instructed by Mr. — (the owner) to accept your proposal"; or, "Under authority given me by Mr. —, I hereby accept for him your offer," etc.

For builders, also, an observance of this precaution is quite as necessary as for architects, inasmuch as a contract carelessly made might turn out to be only with an unauthorized architect, instead of with the owner of the estate; and it is safest for all parties, under such circumstances, to make sure at once either of the owner's previous instructions, or of his immediately subsequent ratification.

**The Consideration.**

An important circumstance of every contract is the consideration; that is, the payment or service which is to be rendered by one party in return for the goods supplied him, or work done for him by the other. A promise without a consideration is void; so that if a man promises to build a house for another for nothing, even though he may make the promise in writing, and before witnesses, he cannot be compelled to fulfil it. In suits for the enforcement of contracts, it is very common for the claim to be raised that the agreement itself, or some subordinate or supplementary promise, was without consideration, that is, without promise or expectation of remuneration for the service; and that it was therefore a *nudum pactum*, or empty agreement, not enforceable in law.

Where the court can be induced to take this view of the contract, or of any part of it, the person who made the promise is released from obligation to perform such portion of it as may

be held to be without consideration ; and it is therefore important for persons who wish to be able to enforce upon the other party the agreements into which they enter to see that a consideration is clearly indicated for the promises that are made.

To make sure of excluding all misapprehension on the subject, it is well to begin contracts for work or materials, even though the value of the work to be done may be small, by saying that "For the consideration hereinafter mentioned, A. B. promises and agrees to deliver certain goods, or do certain work, for C. D.," leaving the details of the consideration to be described later. It is not necessary that the consideration mentioned should be *adequate* to the service rendered. If a man chooses to promise to build a house for another for one dollar, the law does not prevent him from doing so ; and his promise will be enforced ; and any proposed payment, or service, however small, will answer as consideration for a promise of any magnitude ; but a consideration of some sort must be shown to bind the promiser.

There is an exception to this rule in contracts under seal. Anciently, a seal was a mass of sealing-wax, on which the high-born party to a charter or treaty impressed an engraved stone, or, perhaps, his knightly thumb, in token of the solemnity with which he entered into the engagement. Now, in the case of private persons, a seal is commonly a bit of red paper, with mucilage on the back, which is moistened in the most convenient way, and stuck on the document to which it is supposed to add authority, near the signature of the party whose promise it strengthens. In many States, the seal may be even less formal an affair than this ; and in some a blot of ink is held to be a good seal.

However the seal may be made, if it is affixed in the legal manner to the document, it has the effect of making any promise valid, whether a consideration for it is shown or not. In legal language, the seal "imports a consideration," and it is not necessary to show that any other was agreed upon for the promises contained in an instrument thus fortified.

Sealed Contracts.

For this reason, it is common, and usually advantageous to both parties, to have the signers of building-contracts affix seals to their signatures, thus mutually renouncing all opportunities which might be offered for escaping from any of the promises contained in the document, on the ground of want of consideration.

Illustrations of the importance of such a precaution, as well as observations on other properties of seals, will be found in the following chapters, where the various points of building-contracts are taken up in detail.

**Signatures.**

A contract is the mutual agreement of two or more parties, and it is necessary to its validity that some evidence should be available to show that the parties understood their mutual promises in the same way, or, as the lawyers say, that "their minds met," and that they both, or all, consented to be bound by those promises. The best evidence of this is afforded by the signatures of all the parties to a paper in which all the terms of the agreement are fully written out; but this is not invariably required. A case is previously described (Page 6), where a man who was mentioned in a certain document as one of the signers, and who signed it as attorney for some one else, but not in his own name, was held to have also constructively signed it on his own account, because, in signing it as attorney, he must have read it, and seen that he was mentioned as a signer, but did not at the time protest and refuse to sign. So, where one party signs it, and the other, although he does not sign, acts as if he considered the matter settled, and accepts the benefit of what is done for him under it, he is considered to have adopted and ratified it, and to be bound by it, as if he had signed it.

*Kerfoot vs.  
Cromwell,  
115 Ill. 502.*

**Signature  
by One Party  
Only.**

*Stone vs.  
Rennock,  
31 Mo. App. 544.*

*M. E. Parish  
vs.  
Clarke,  
74 Maine, 110.*

A curious case involving this point was decided in Maine. One Clarke slated a church roof, and warranted it tight for ten years, under a contract with the church building-committee, which, however, was signed only by one member of the committee. There was no vote of the parish authorizing the building-committee to make the contract in its name, but, when the

work was done, the church paid the price mentioned in the contract. Afterwards, the roof began to leak, and Clarke was called upon to repair it, which he refused to do, on the ground that the contract was invalid. The Supreme Court held that it was invalid against the church, so that Clarke could not have recovered on it, if the church had refused to pay him the contract price, but that, so far as he was concerned, it was valid, and he was bound by the covenants in it.

If either party is unable to write his name, he may sign a contract with his mark, some properly authorized person writing the name for him in the usual form close by; and this signature will be perfectly valid; but it has been held that where a contract is signed with a mark, the other party to the contract is not a proper person to write the name of the one signing with a mark, and that a signature so made is not a valid execution of the instrument.

A person who has signed a contract hastily, without reading it with proper care, or without reading it at all, cannot escape from it on that ground. The law is that if he was of mature age, and able to read and write, and had an opportunity to read the paper, and no artifice was used to induce him to sign it, he is bound by it, whether he read it or not; and it has even been held that the fact that the contract was in a foreign language, not very familiar to the signer, did not excuse him.

In a case in the District of Columbia, where the contract was partly in print, and partly in writing, and the written part only was read over to the contracting party, and he then directed his signature to be placed to the paper, it was held that he was bound by the agreement, although he neither read nor had read to him the printed matter; it being shown that he was able to read and write, and had an opportunity to read the printed part of the contract, and it was not fraudulently concealed or withheld from him.

It is well to remember that where a contract is partly written and partly printed, as is often the case with building contracts, the written provisions control, if there is any inconsistency

*Carlisle vs.*  
*Campbell,*  
76 Alab. 247.

*Wright vs.*  
*Dunnell,*  
2 Camp. 203.

*Rayner vs.*  
*Linthorne,*  
2 C. & P. 124.

*Farebrother vs.*  
*Simmons,*  
5 B. & Ald. 333.

*Shaw vs.*  
*Finney,*  
13 Met. 453.

*Carpenter vs.*  
*I. N. Bank,*  
119 Ill. 362.

*Moore vs.*  
*Henry,*  
13 Mo. App. 35.

*Brown vs.*  
*Wabash,*  
18 Mo. App. 568.

*Robinson vs.*  
*Jarvis,*  
25 Mo. App. 421.

*Gwin vs.*  
*Waggoner,*  
98 Mo. 297.

*Thompson vs.*  
*Riggs,*  
6 D. C. 99.

*Mansfield vs.*  
*Lowell,*  
62 Mich. 546.

*U. P. R. R. vs.*  
*Graddy,*  
25 Neb. 854.



between them and the printed part, the natural supposition being that more attention is paid by the parties to the written portion.

*Judd vs.  
Ensign,  
6 Barb. 258.*

If two contracts, supposed to be duplicates of each other, prove to differ, if either party complies with the one in his hands, that one will be held to be valid.

*Party Sign-  
ing is Bound.*

*Stephens vs.  
Buffalo,  
20 Barb. 332.*

After a contract is signed by one party and delivered to the other, the one who signed it is bound, even if the other does not sign it. In a New York case, a person who had signed a paper, on returning it to the messenger who brought it to him from the other party, said that he would only be bound by it if certain things were done. Before the things were done, he wrote, saying that he withdrew from the agreement, and would not be bound by it. The matter was brought to the Supreme Court, which decided that parol evidence of conditions qualifying the delivery was not admissible, and that the person who had signed the document was bound, although the other party had not signed it.

*Reedy vs.  
Smith,  
42 Cal. 245.*

*Memory vs.  
Niepert,  
131 Ill. 623.*

*Fairbanks vs.  
Meyers,  
96 Ind. 92.*

In the same way, where a contract which provided for payment by instalments had been signed by one party only, but had been ratified indirectly by the other party by the payment of some instalments, it was held that the contract was valid. Any ratification of this kind, if the court is satisfied that the parties really understood at the time that an agreement existed between them, is likely to be held to substantiate the contract, whether it is signed by both parties or not, and neither will be allowed, if he changes his mind, to escape on the pretext that his actual signature is lacking.

*Informal  
Acceptance  
of Proposal.*

*Burch vs.  
New Lindell,  
7 Mo. App. 583.*

An allied case is that of a contract formed by proposal and acceptance, where the acceptance is informal. Under such circumstances, as with contracts of the regular sort, if one party gives the other reason to think that he has agreed to the proposition, he will find it hard to escape from it later on the ground that he had given no formal assent to it. In a Missouri case, a man made a written proposition to do a piece of work on certain terms. The one to whom the proposition was

addressed, without saying whether he had accepted or rejected the proposal, directed the other to go on and do the work. A controversy having arisen later about payment, it was held by the Court of Appeals that the terms of the proposal formed the contract between the parties, and that the party making the proposal might recover in accordance with it.

Where, however, one party signs, and the other neither signs, nor does anything else, within a reasonable time, to indicate that he assents to or adopts the agreement, the matter lapses, and neither party is bound.

The delivery of a contract may be a very informal matter. If the paper is left at the store of the merchant, the shop of the mechanic or manufacturer, or the farm of the farmer, who is a party to it, the delivery is complete, unless the contract itself specifies some place or mode of delivery. In fact, it is not essential that the document should be delivered at all. In an Illinois case, the only copy of the contract that was signed was left with the architect, for the benefit of both parties; and it was held that this was all the delivery that was necessary.

*Burch vs.  
New Lindell,*  
7 Mo. App. 583.

*Keller vs.  
Blasdel,*  
1 Nev. 492.

**Delivery of  
Contract.**

*Bronson vs.  
Gleason,*  
7 Barb. 472.

*Coey vs.  
Lehmann,*  
79 Ill. 173.

## CHAPTER XVII.

### CONTRACTS WITH CORPORATIONS.

**Difference  
Between Con-  
tracts with  
Corporations  
and Private  
Individuals.**

**A**LTHOUGH a contract with a private individual is a very informal affair, and almost anything will be regarded as a proper signature which shows the intention of the parties, it is very different where a corporation is one of the parties to the agreement. While a private individual may enter into any sort of contract that he chooses, so long as it is not immoral, and will be held to the fulfilment of any promise in consideration of which he has received benefit from another, the powers of corporations are strictly limited, either by their charters or by statute, and they cannot be compelled to carry out promises made by their officers beyond the bounds of their authority, no matter what may be the hardships inflicted upon the persons who have incautiously trusted them

**Necessity  
for Corporate  
Seal.**

In England, and formerly in this country, not only must a contract entered into by a corporation be within the scope of its authority, but, besides the signatures of the proper officers, the seal of the corporation must be affixed to the agreement to make it valid, unless some special statute has authorized the seal to be omitted. A story was told in the English papers a few years ago illustrating this point. A young architect made plans for a school-house for a town. After some discussion, his plans were adopted, and, by a formal vote of the proper officers, he was appointed architect of the building. The work was carried out under his direction, to the satisfaction of

everybody concerned, and, when all was completed, he sent in his bill, payment of which was coolly refused, on the ground that his appointment was not under the corporate seal of the town, and was, therefore, invalid. The school officials did not pretend that the architect had not done his work properly; on the contrary, they said that they were perfectly satisfied with it, but, as the corporation could not be bound without the seal, they did not propose to lose the benefit of the omission, and the architect would have to get along without his money as best he could. The latter brought suit, and must inevitably have been defeated had it not been discovered that a special statute, which the astute town officers had probably forgotten, expressly authorized towns, for the purpose of facilitating the erection of schools, to make contracts in regard to them without the seal; and, as the engagement of the architect came within this statute, the town was, in the end, compelled to pay the bill with costs.

In this country, the contracts of corporations, signed by the proper officers, and made in accordance with the statutes or charters regulating the affairs of the corporations, may be considered as valid without the seal. In many of the States decisions have already been given in accordance with this view, and it is probable that the example would be followed in the others if occasion should arise.

It is, however, very necessary that, with or without the seal, the contract should be within the authority of the corporation, and of the officers who claim to represent it, and our courts hold that it is the duty of the person who wishes to make a contract of the kind with a corporation to inform himself on this point; and that, if he fails to do so, the corporation cannot be held liable for losses which he may suffer in carrying out an agreement entered into without proper authority. The town of Bridgeport once appointed by vote a committee to procure plans and estimates for a high school, and to contract for the erection of the building at a cost not to exceed \$55,000. A contract was made with one Turney for

*Merrick vs.*  
Burlington,  
11 Iowa, 75.

*Barlow vs.*  
Gray,  
57 Mich. 623.

*Bank of Columbia vs.*  
Patterson,  
7 Cranch. 305.

*Fleckner vs.*  
Bank of United  
States,  
8 Wheat. 338.

*McCulloch vs.*  
Talledega Ins.  
Co.,  
46 Alab. 376.

*Turney vs.*  
Bridgeport,  
55 Conn. 412.

Turney vs.  
Bridgeport,  
55 Conn. 412.

the main part of the work, but the heating, ventilation and plumbing were excepted from his contract, and taken by other parties, at an agreed price. In the written contract with Turney, the vote of the town was recited. His contract, exclusive of the heating, ventilation and plumbing, was \$42,250. After the school-house was finished and occupied, he demanded \$35,000 more, saying that he had spent \$26,500 above his original contract price, and claiming that the committee and the Board of Education had made a new contract with him, promising, and binding the town, to pay more than the \$55,000, and that under this contract he had spent the extra money. The Supreme Court of Connecticut held that "It is clear beyond discussion that when a town, by a legal vote, limits the amount of an appropriation for a particular and specified purpose, and by the same vote appoints a committee to carry that purpose into effect, such committee has no implied authority to involve the town in any extra expense whatever." This, the court said, followed from the peculiar character of a town corporation, and the fact that the property-rights and interests of each inhabitant were involved in every contract made by, or on behalf of the town. "The town cannot contract except by vote passed at a legal town-meeting, or in strict accordance with the positive provisions of some statute. If committees could bind the town beyond the appropriations," said the court, "the property of the inhabitants would be at the mercy of combinations between committees and contractors."

The plaintiff's counsel argued that the town was enjoying the benefit of the result of his labors; but the court held that this argument was not good, as the town had a right to do so, without incurring liability. In regard to the question whether Turney, having been informed of the amount of the appropriation, was obliged to concern himself about the other contracts, to see whether there would be money enough left to pay him for extra work ordered by the committee, the court said that, having notice of the vote, he was "put on inquiry" as to the

cost of works not included in his contract, and was bound to see whether the total exceeded the sum appropriated.

A very similar controversy occurred in connection with the building of the Illinois State-House. The statute of 1883, relating to the completion of this structure, provided that all contracts for labor and materials requiring the expenditure of more than \$500 should be let to the lowest responsible bidder or bidders, after advertising for bids or proposals for at least thirty days, and that contracts entered into contrary to this provision should be null and void.

*Little v.  
Jayne,  
124 Ill. 123.*

The State-House Commissioners obtained some models for statuary, at a cost of \$2,400, and accepted a proposition of Poulson & Eger, of New York, to execute them in metal, by the galvano-plastic process, for \$7,600. No advertisement was published which could be interpreted as inviting bids for statuary, and only one statue was sketched on the elevations of the building, and nothing was said about statuary in the specifications. Moreover, a "manufacturer of metal statuary," Mr. Mullins, who made a bid on the ornamental ironwork, found no mention of metal statuary in the specifications, and was not invited to bid on any. On the contrary, one of the Commissioners told him that the statues, one of which was shown in sketch on the elevation, were to be of plaster. If Mr. Mullins had known of the letting of the contract for this statuary, he would have put in a bid for it, as his firm was particularly anxious to get this sort of work. The architect testified that it was not decided what metal to use for the statues until Poulson & Eger's bid was in, and that it was accepted two days later, showing that thirty days' advertisement for bids could not have been made. There was evidence that the price agreed to be paid to Poulson & Eger was \$2,800 or \$3,000 above the reasonable value of the statues. Theirs was the only bid.

Suit was brought to enjoin the Commissioners from issuing vouchers for the payment of the money to Poulson & Eger. The Appellate and Circuit Courts refused the injunction, but

the Supreme Court reversed their decision, thus requiring the injunction to be issued.

*Brady vs.*  
*Mayor,*  
18 N. Y. P. R.  
343.

A case of the same sort, described in the New York Reports, has an additional interest as furnishing an illustration of the famous "unbalanced bids," which at one time were said to have been the means of transferring a good deal of public money into pockets where it did not belong.

*Unbalanced*  
*Bids.*

The charter of the City of New York provides that all work done for the city, and involving the expenditure of more than \$250, shall be done in pursuance of a contract, awarded upon sealed bids; and that all such contracts shall be awarded to the lowest bidder. In 1854, the Street Commissioner was authorized by a resolution of the Common Council to invite proposals for setting curb and gutter stones, and flagging the sidewalk of a portion of Eighty-third Street. The invitation to bidders described the curb and gutter, and the flagging required, and specified the kind of stone to be used, and the manner of cutting and laying. It stated also that "the street is to be brought to the grade shown on the profiles in the Street Commissioner's office; the sidewalks to be regulated with sufficient rise from the curbstone, and the carriageway to be properly shaped under the direction of the surveyor." It further required that "estimators should state in their proposals the price per running foot for furnishing and setting curb and gutter stones, including regulating and removing or furnishing earth; the price per square foot for flagging, including the regulating of the sidewalks, and furnishing sand or gravel; also, the removal of all surplus material or rubbish after the completion of the work; and the price per cubic yard for removing rock, if any should be found." The notice then continued, "The following is the estimate of work and materials by which the work will be tested, viz: 3,840 running feet of curb and gutter stone, and 15,600 square feet of flagging."

Brady offered to set the curb and gutter-stones at forty-five cents per running foot; to do the flagging for eleven cents per square foot, and to remove rock for twenty-five dollars per cubic

yard of rock removed. One McCabe made a proposal to remove rock for five dollars per cubic yard, and to do the other work at prices somewhat higher than Brady's. Two other proposals were received, neither of which included a price for removing rock, and both of which appear to have been higher for the rest of the work than Brady's. Brady's was accepted, and a contract made with him. The work was done and accepted, and an assessment for the cost laid on the abutters, and confirmed by the Common Council. The bill was as follows:

4,046 ft. 6 in. of curb and gutter @ 45c.	\$1,820.92
15,686 ft. of flagging @ 11c.	1,725.46
943 yards of rock excavation @ \$25	23,575.
	<hr/>
	\$27,121.38

Payments were made on account to the amount of seventy per cent of the bill, but payment of the balance was refused, and Brady sued for it. A referee, appointed by the court, found that the contract was illegal, so far as regarded the rock excavation, but that, as it had been done and accepted, Brady was entitled to the money on *quantum meruit*. The Supreme Court, however, decided that the contract for rock excavation was illegal and void, and imposed no obligation on the city as to any of its stipulations.

There are many other cases which illustrate the same point, and contractors cannot be too careful to see that proper authority has been given for all the contracts which they make with public officers, and all the orders which they receive from them, if they wish to be sure of getting their pay for what they do. In the words of one court: "It devolves on those seeking to enforce a public contract to show that it is within the statutory authority, while a private contract is presumed to be valid." And another says: "All persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation to make contracts."

Moreover, it must be remembered that an association may

Chicago vs.  
Shober,  
6 Bradw. 560.

Whiteside vs.  
U. S.,  
83 U. S. 237.

State vs.  
Hayes,  
52 Mo. 518.

DeLafield vs.  
State,  
26 Wend. 238.

People vs.  
Bank,  
24 Wend. 431.

Mayor vs.  
Reynolds,  
20 Md. 10.



*Southworth vs. Flanders*,  
33 La. 190.

*Sanborn vs. Neal*,  
4 Minn. 126.

*Keating vs. Kansas City*,  
84 Mo. 415.

*Lescher vs. Commissioners*,  
9 Mont. 315.

*Dement vs. Rokker*,  
26 Ill. 174.

*Wilkins vs. Wardens, etc.*,  
52 Geo. 315.

**Extras in Public Contracts.**

*Sexton vs. Cook Co.*,  
114 Ill. 174.

not be incorporated, and, unless incorporated, it cannot be sued, and debts which it owes cannot be recovered. Church societies, in particular, often exist for years without legal incorporation, and persons transacting business with them do so at very considerable peril. It is often thought that if the corporation or society is not legally liable, the persons who represented them in making the contract must be individually liable, so that the contractor is sure of a remedy against some one; but this idea is very far from being correct. In a case in Georgia, where both these points were involved, the Supreme Court said that "A church society, unless incorporated, cannot "be sued." Members acting as agents of the society are not liable for its debts unless they individually promise, for a consideration, to pay them. It is so easy to incorporate, and to ascertain whether such a body is incorporated, that "if men "will make business transactions of the character disclosed by "this record, they must take the consequences."

Orders for extra work under contracts, or for work of any kind, come under the same rule as contracts, and must be properly authorized, and given by the proper officers, and in the proper manner, to impose any obligation on the corporation. During the construction of the Chicago Court-House, the County Board passed a resolution instructing a contractor, Sexton, to build a foundation for a dome, under the supervision of the architect, and subject to the architect's valuation. The resolution was accepted by the contractor, and the foundation built, and it was held by the Supreme Court that this was a valid contract. After the foundation was done, however, the architect and the joint committee of the city and county authorities ordered the wall of the dome to be carried up to the roof. The contractor obeyed, and the county authorities saw the work going on without objection, and even paid for a considerable part of it, but, on their refusal to pay any more, it was decided that the order for the work above the foundation was not binding on the county, although the county authorities had in part ratified it by allowing

it to go on without objection, and making payments on account of it.

Not only can nothing be recovered on a contract illegally made with the representatives of a public body, even if the work is entirely performed, but the agreement, where it is within the legal authority of the officials who make it, must be made with due formality, or it will not be binding on the corporation which they represent. It has been held that an agreement made by County Commissioners, not at a regular meeting of the Board, but in vacation, was not binding on the county; and, where the individual members had separately signified their assent, this was held to be insufficient.

Where work is carried on for a corporation under the direction of a building-committee, the majority of the building-committee must concur in making any contract, or in varying one already made.

In certain other respects, the rights of a contractor against a corporation are much more restricted than they are against a private individual. For example, no mechanic's lien can be maintained for work on a public building, such as a public school-house, court-house, jail, town-hall and so on; and the property of corporations other than towns, counties or States, where it is used for the public service, as in the case of railway cars and stations, ferry-houses and similar structures, is exempt from mechanic's lien.

Even with the consent of the proper officials, the debt of a contractor cannot be assumed by the public corporation which they represent. In a case in Indiana, where a building was in process of construction for a county, the contractor abandoned his contract. The County Commissioners took possession of the building, and finished it, without letting a new contract. In a suit afterward on a claim for materials furnished to the original contractor, it was held that in such cases the county was liable for labor and materials furnished at the request of the Board, and used in the completion of the building; but that the Board had no power to assume any indebtedness of

**Public Contracts Must be Made with Due Formality.**

*Campbell vs. Brackenridge,*  
8 Ind. 471.

*Archer vs. Commissioners,*  
3 Ind. 501.

*Eigemann vs. Board,*  
82 Ind. 413.

*Howard vs. Ind. School,*  
78 Maine, 230.

*Asylum vs. Johnson,*  
43 Maine, 180.

**Corporation Cannot Assume Contractor's Debts.**

*Bass vs. Board,*  
115 Ind. 234.

**Public Corporation not Obligated to Carry out its Contract.***Lord vs. Thomas,*  
64 N. Y. 107.

the contractor for materials furnished to him, and that for such indebtedness the county could not be made liable.

In a similar way, a public corporation is to a certain extent exempt from the usual obligation to fulfil its contracts. A contract was once made for a public building for the State of New York. The contract was made in due form, but for some reason the erection of the building was postponed. The contractor brought suit to compel the State to go on with the building according to the agreement; but the Court of Appeals decided that the State could not be compelled to proceed with the erection of a public building at the instance of a contractor. If the State broke the contract, the contractor, if not himself in default, would have a just claim for damages, but his remedy would be by a petition to the Legislature for the satisfaction of his claim.

**Liability of Individual Officials.***Sharp vs. Smith,*  
22 Ill. App. 336.

A contractor who incautiously enters into a contract with persons claiming to represent a corporation, but who turn out to have been insufficiently authorized, or not to have made the agreement in legal form, may sometimes, if he fails to collect his pay from the corporation, get redress from the individuals who led him to think that they had proper authority for employing him. There is, in fact, often a question whether the contract for a public building is really a contract with the corporation for whose benefit it is to be built, or a personal contract with the individuals who sign it, and it is very much for the advantage, not only of the contractor, but of the people who act as members of building-committees, that this point should be clearly settled before the agreement is signed. Three persons, signing themselves as "School Directors," made a contract for the erection of a public school-house in Illinois. The town had appropriated \$700 for building the school-house, and the town treasurer paid drafts drawn by the school directors to that amount. A draft was given by the directors for a balance of \$224.60 beyond the \$700, but payment of it was enjoined, on application of some of the tax-payers. A suit was brought for the money against the directors personally,

and they were held liable, as it did not appear in the contract that it was the contract of the town, and the Court held that the words "School Directors" after the names of the signers were merely descriptive.

A similar, and very instructive case was decided in Massachusetts. The town of West Brookfield, at a town-meeting held January 24, 1863, passed a vote to finish the basement of the town-house according to a certain plan, at an expense not to exceed \$500, and chose Lemuel Fullam, John M. Fales and Augustus W. Gilbert as a committee to contract for the work. This committee accordingly made the following contract with William Fullam:

WEST BROOKFIELD, MASS., January 27, 1863.

We, the undersigned, a committee chosen by the town of West Brookfield to finish the basement of their town-house for the purpose of a meat-market, do hereby agree to pay Mr. William Fullam, of North Brookfield, Massachusetts, the sum of four hundred and seventy-five dollars for the finishing of said basement according to specifications and plan annexed, when completed to our acceptance.

LEMUEL FULLAM [Seal],	} Committee for the Town.
JOHN M. FALES [Seal],	
AUGUSTUS W. GILBERT [Seal],	

January 31, another town-meeting was held, at which the town voted to rescind its former vote, and chose a committee "to confer and settle the matter with the contractor." The contractor refused to stop work, and the town obtained a perpetual injunction, restraining him from proceeding. The contractor then sued for damages for being prevented from fulfilling his contract. The case was carried to the Supreme Court, which held that the contract was not the contract of the town, but only of the individuals who signed it, and that the plaintiff's remedy, if he had any, was against them, although they, if he recovered damages from them, might look to their principals for indemnity. The action of the town, in revoking its original vote, and preventing the completion of

Sharp vs.  
Smith,  
32 Ill. App. 336.

Fullam vs.  
West Brook-  
field,  
9 Allen, 1.

Damon vs.  
Granby,  
2 Pick. 346.

Abbey vs.  
Chase,  
6 Cush. 56.

Huntington vs.  
Knox,  
7 Cush. 374.

*Fullam vs.*  
*West Brook-*  
*field,*  
9 Allen 1.

*New York*  
*Cases:*

*Randall vs.*  
*Von Vechten,*  
15 Johns. 68.

*Bank of Me-*  
*more vs.*  
*Chick,*  
14 Pet. 19.

*Brockway vs.*  
*Ellen,*  
17 Wend. 40.

*Bank of Co-*  
*lumbia vs.*  
*Patterson,*  
7 Crauch, 306.

*Thomas vs.*  
*Caldwell,*  
50 Ill. 138.

*Haight vs.*  
*Sahler,*  
30 Barb. 218.

the work, was held not to make it liable in damages to the contractor. The Court remarked that it appeared to be the law of New York that where an agent, duly authorized to make a contract for his principal, made the contract in his own name, he was not liable for a breach of it, if the contract was for the exclusive benefit of the principal; but it said that this was not the law of Massachusetts, or of England.

In this case, although the corporate seal of the town would not have been necessary to legalize the contract, if it had been otherwise properly made in behalf of the town, the fact that the individual members of the committee affixed their private seals seems to have confirmed the character of the instrument as their own contract, and not that of the town; but the seals alone would not have given it that character without warrant from the language of the contract.

In regard to the liability of the members of a committee which finds itself in such a plight as the West Brookfield one, it has been held in Illinois that where a church building-committee had contracted for the erection of a church building, and the names of the members were given in the contract, but one member did not sign the contract, that member was not personally liable under the contract.

The New York law, as before mentioned, is more favorable to members of building-committees and similar bodies. Where certain persons had been appointed a building-committee by a corporation, and were authorized as such to contract for the erection of a building for the corporation, it was held that a contract for such purpose, entered into by them in their individual names, but describing them as "building-committee" wherever their names occurred, was not binding on them personally, but on the corporation.

It will be seen from these cases that he who makes a contract either for or with a corporation, either public or private, should do so with great caution. Many corporations are formed for the purpose of evading liability on the part of the men who practically own and manage them, and who, by

placing most of the stock in the hands of irresponsible dependants, can, without risking their own property, pile up debts against the corporation, which can never be collected, for lack of corporate assets to pay them with; and even where a corporation is formed and managed in good faith, the directors have no right, out of a mere sentiment of honor, to pay away the stockholders' or citizens' money to persons who have no legal claim to it.

## CHAPTER XVIII.

### VERBAL AND WRITTEN CONTRACTS.

**Written  
Contract Ex-  
cludes Verbal  
Variations.**

*Ocey vs.  
Lehmann,*  
79 Ill. 173.

*Lane vs.  
Sharp,*  
3 Scam. 566, 7.

*Pearce vs.  
McGowan,*  
35 Minn. 507.

*McCormick vs.  
Wilson,*  
39 Minn. 467.

*Taylor vs.  
Fox,*  
16 Mo. App. 527.

*Stuart vs.  
Cambridge,*  
125 Mass. 102.

IT has been before observed (Page 181) that a written contract is not legally more binding than a verbal one, but that, in view of the greater formality attending the signing and delivery of a written document, the written paper is presumed in law to contain all that the parties to it intended to agree upon, in its final and mature shape, casting aside all merely verbal propositions and suggestions; so that evidence of the latter is not received in court, where it tends to contradict or modify the terms of the written contract. In an Illinois case, which finds a good many parallels elsewhere, the contractors claimed that it was understood that certain changes should be made in the specifications attached to the contract, but that at the time of signing the contract these changes had not been made, and that therefore the contract was never perfected. The Supreme Court ruled that all prior agreements, understandings and arrangements must be regarded as merged in the contract as signed, and evidence of parol variations must be excluded. So in the case of *Stuart vs. Cambridge*, described at length in Page 148 and the following, where parol evidence was offered that the plaintiff made his estimate from a section showing the foundations extending only fourteen inches below the cellar floor, and that other bidders did the same, it was held that the evidence was inadmissible.

A somewhat similar, but still more instructive case is to be found in the Minnesota reports. A firm of architects and builders

furnished plans and specifications, and contracted to build a mercantile building on a certain lot. The specifications gave widths of footings, etc., but no other particulars about foundations. When the matter of building was talked about, the question of draining the subsoil of the lot was mentioned, and the owners said that they did not think it would need draining, but if any draining should be needed, they would do it. The contract, as finally entered into, was under seal. In it the contractors agreed to build, erect and complete a three-story business house on a certain lot, in accordance with plans and specifications, which formed part of the contract. On uncovering the subsoil, after the signing of the contract, quicksand appeared, which the contractors had no previous knowledge of, and could not have known anything about. The defendants' pleading averred that, on the discovery of the quicksand, the owners, finding that the subsoil would not, unless drained, sustain the proposed building, "promised that they would cause the land to be well and thoroughly drained; but that they wholly failed and neglected to drain the land or any part thereof." The contractors went on with the building, without seeing that the subsoil was put in proper condition. When it was nearly completed, it fell, the quicksand beneath having become saturated with water. The contractors began to rebuild, and had nearly completed the building a second time, when it fell again, from the same cause as before. They then refused to proceed further with the work under their contract, and the owners brought suit to recover back the money which they had already paid on account of the contract, with damages for loss of the use of the lot during the unsuccessful attempts to build upon it, and for injury caused to the adjoining building, also owned by them, and to the goods in it, by the fall of the new structure.

The Supreme Court of Minnesota decided in favor of the owners on all the points brought up. In regard to the alleged promise made by them, before the signing of the contract, to drain the land, the Court said that evidence of this was

*Stess vs.  
Leonard,  
20 Minn. 494.*

**Draining  
Quicksand.**



Stees vs.  
Leonard,  
20 Minn. 484.

inadmissible to vary the rights and obligations of the parties under the subsequent sealed contract. As to the subsequent promise of the owners, made after the discovery of the quicksand, to "cause the land to be well and thoroughly drained," the Court said that this mere promise, being without consideration, was *nudum pactum*, on which the contractors had no right to rely, and which was inoperative to vary the sealed contract. In regard to what the agreement required the contractors to do, the Court held that the defect in the soil did not excuse the defendants from the performance of their contract; that for their failure to perform it they were liable in damages to the owners, and that it was no defence to the action that the building, so far as it was erected, was constructed in accordance with the plans and specifications.

During the trial of the case, the defendant's counsel offered to prove that on the discovery of the insufficiency of the land to sustain the building, unless drained, the owners agreed to keep the land well and properly drained during the construction of the building; and in consequence thereof the defendants did not drain it themselves; that the owners kept the land drained until just before the fall of the building, when they neglected to keep the same drained, by reason of which neglect the soil became saturated with water, and the building fell. The Court held that this evidence was inadmissible, the facts offered to be proved not being pleaded in the defendant's answer, and being inconsistent with the facts therein pleaded. The Court was of opinion, however, that the facts offered to be proved would, if pleaded, constitute a good defence to the action.

The Responsibility  
for the Failure  
of Legal  
Structures.

It may not be out of place to remark here that, while the unfortunate builders were compelled to bear the expense of repairing the damage caused by a defect which they could not have foreseen when they signed their contract, a very different rule seems to have been applied to their counsel. The latter, to whom was committed the responsibility of the case, appears to have erected, with a full knowledge of the facts, a fabric of

defence which collapsed in a moment on the application of well-known legal principles. It was shown that he had a good foundation for a successful defence, if he had chosen to avail himself of it; yet he contented himself with basing his case on a parol agreement made before the signing of the written contract, and not mentioned in the latter, and on a promise which was obviously without consideration. A more insecure foundation for a legal structure it would be difficult to conceive; yet, having chosen to use this, instead of the substantial one which lay close at hand, we do not find that he was even asked to indemnify his clients for the collapse of their interest under his care, while they were compelled, apparently as a result of his ineffectual championship, to suffer enormous loss on account of a defect in the foundation of their structure, which they could not possibly have known anything about, and which, on its discovery, some one else had agreed to remedy.

However, it has been already observed that the law is made by lawyers, not by contractors, and the latter must content themselves with studying legal matters as they are, not as they would like to have them.

There is an apparent exception to the rule that parol testimony is not admissible to vary a written contract, in cases where the verbal testimony, instead of varying the written agreement, merely supplies deficiencies in it. A mason named Daegling once made a written agreement with a general contractor, Donlin, "to do the mason work" in rebuilding a certain court-house which had been burned, "according to plans and specifications to be furnished," and "under the supervision and to the entire satisfaction" of a superintendent to be appointed by the county authorities. No plan or specification showing how much work was to be done on the outside walls was ever furnished, but Donlin showed Daegling on the spot the lines to which he wished the walls to be taken down and rebuilt. Daegling took them down accordingly, but, when they had been taken down to Donlin's line, the county authorities

**Parol Testimony Admissible to Supply Deficiencies in Written Contract.**

Donlin vs.  
Daegling,  
80 Ill. 608.

*Donlin vs.  
Daegling,  
80 Ill. 608.*

wished to have more taken down, and the architect directed that this should be done. Daegling said that this would be extra work, and Donlin said he would pay what it was worth. Afterwards, he claimed that it was not extra, on the ground that the verbal conversation about the line to which the walls should be taken down was superseded by the written contract, and that testimony in regard to it was not admissible. The Supreme Court of Illinois, however, held that the testimony was admissible, as supplying the omission in the written contract of any description of the amount of work to be done; and that the taking down of the wall beyond the line which he had given was really extra work.

*State ex rel.  
Yeoman vs.  
Hoshaw,  
96 Mo. 358.*

So, where there is only a written memorandum of a contract, which does not purport to be a complete expression of the entire contract, or where a part only is reduced to writing, the matter omitted may be supplied by parol evidence.

Where fraud was used in obtaining a signature to a contract, evidence in regard to it will be admissible, even though the fraud may have consisted in verbal representations in regard to the matters subsequently covered by the written contract. It is a familiar rule of law that fraud vitiates all contracts, and if this is alleged in the pleadings, the evidence necessary to sustain the allegation will be received.

*Brown vs.  
Strimple,  
21 Mo. App. 338.*

One Strimple agreed with Emily Brown to build for her a house, for a certain sum, to be completed on a certain day, with liquidated damages for delay, which were fixed at \$3 per day. The house was to be completed October 15. It was not done until December 5. Mrs. Brown paid the contract price in full, and then sued to recover back \$500 as damages for the delay. Strimple claimed (1) that the lot was represented as unobstructed, whereas there were old buildings on it, which had to be removed, and that this caused twenty days delay; (2) that the plaintiff represented that there was a water-main in the street, whereas there was none; that it was the duty of the plaintiff to afford facilities for obtaining water; and that, on her attention being called to the absence of a water-main,

she promised to attend to it, but failed to do so, whereby a delay of four weeks was caused; and that all the representations of the plaintiff in regard to the water were false and fraudulent; (3) that the plaintiff requested the defendant not to lay certain parts of a pavement until she had completed certain terrace steps, which she proposed to build in front of the house; (4) that during the construction of the house, the planing-mill was burned, causing a delay of thirty-five days. The defendant also claimed that there was a custom, when old buildings were to be removed, to mention this fact in the specification. It was proved that, in regard to the planing-mill, the defendant made a written claim on the architect for an extension of the time of completion, and that the architect allowed it; but no claim was made or allowed in regard to any of the other alleged causes of delay. The contract provided that the forfeiture for delay should be due from the contractor, provided he was not kept back by an unavoidable accident or hindrance, over which he had, or could have, no control; and that no such accident or hindrance should be credited as an extension of time for the completion of the contract, unless the same should be claimed under a written request by the party of the second part, and approved by the party of the first part, or by the superintending architect, in the week that such accident or hindrance should occur.

The court held that the evidence of the custom of builders in regard to specifying about old buildings on a lot was inadmissible, as the plaintiff was not a member of the class in which this custom existed. The defence on the ground of the burning of the planing-mill was admitted; but, as to the other defences, the court said that, if sustainable at all, they rested on the ground of false representations made, and orders given by the plaintiff. There was no evidence whatever of either of these, or of any written application to the architect for extension of time on account of them. Judgment was therefore ordered against the builder.

Brown vs.  
Strimple,  
21 Mo. App. 333.

## CHAPTER XIX.

### THE STATUTE OF FRAUDS AND LIMITATIONS.

**T**HERE are certain cases, as was mentioned in the first part of this book, where the law interposes to prevent disputes and misrepresentation, by means of special statutes, providing that contracts of certain kinds, in regard to which there is most likely to be misapprehension or error, shall not be valid, or enforceable at law, unless they are made in writing, and signed by at least one of the parties interested. These special statutes are known as the Statutes of Frauds and Limitations, and may sometimes be of serious importance to builders.

Statute of  
Frauds of  
Maine.

The first part of the Statute of Frauds and Limitations of Maine reads as follows :

“ No action shall be maintained in any of the following cases :

1. “ To charge an executor or administrator upon any special promise to answer damages out of his own estate ;
2. “ To charge any person upon any special promise to answer for the debt, default or misdoings of another ;
3. “ To charge any person upon an agreement made in consideration of marriage ;
4. “ Upon any contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them ;
5. “ Upon any agreement that is not to be performed within one year from the making thereof ;

6. "Upon any contract to pay a debt after a discharge therefrom under the bankrupt laws of the United States, or assignment or insolvent laws of this State;

"Unless the promise, contract or agreement, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto lawfully authorized; but the consideration thereof need not be expressed therein, and may be proved otherwise."

So far as builders are concerned, the portion of the statute which most interests them is that which provides that contracts for work which is not to be performed within a year must be in writing. Probably nine-tenths of the contracts made with builders are verbal, and a large part of these are for work which is very unlikely to be performed within a year.

Fortunately for them, the courts take an indulgent view of the law, and usually hold that if the contract could have been performed within a year, even though the agreement did not require it to be so, the Statute of Frauds does not apply to it. A man once agreed verbally to allow another to come upon his land at any time within ten years, and cut certain trees. Some years later, the land was divided, and when the tree-cutter came after his property, he was sued for damages as a trespasser, on the ground that the original contract was void. The Supreme Court, however, held that he might have cut all the trees within one year, if he had wished to do so, and that therefore the contract was valid.

In another case, a man agreed verbally to work for another five years, or as long as he should be agent for a certain company. If he had simply agreed to work for the other for five years, this promise would probably have been held void for want of writing; but, in a subsequent controversy, it was decided that the contract was valid, because he had qualified his agreement to work for five years by adding the words "or as long as he should be agent for the company," and he might have been discharged by the company within a year, so that the Statute of Frauds did not apply to the transaction.

**Agreement  
not to be Per-  
formed with-  
in a Year.**

**Roberts vs.  
Rockbottom  
Co.,  
7 Met. 46.**

*Blanding vs.*  
Sargent,  
33 N. H. 239.

*Sonoh vs.*  
Strawbridge,  
2 C. B. 808, 815.

*Wells vs.*  
Horton,  
4 Bing. 40, 43.

*Blake vs.*  
Cole,  
22 Pick. 97.

*Kent vs.*  
Kent,  
18 Pick. 569.

*Lyon vs.*  
King,  
11 Met. 411.

*Tatterson vs.*  
Suffolk,  
106 Mass. 56.

*Moore vs.*  
Fox,  
10 John. 244.

*McLees vs.*  
Hale,  
10 Wend. 426.

*Shute vs.*  
Dorr,  
5 Wend. 204.

*Linscott vs.*  
McIntire,  
15 Maine 201.

*Russell vs.*  
Slade,  
12 Conn. 445.

*Plimpton vs.*  
Curtiss,  
15 Wend. 336.

*Clark vs.*  
Pendleton,  
20 Conn. 495.

*Lockwood vs.*  
Barnes,  
3 Hill 128.

*Esty vs.*  
Aldrich,  
46 N. H. 128.

*Ellicott vs.*  
Peterson,  
4 Md. 476.

In a New Hampshire case, it was held that if the time of performance might arrive within a year, even though it should be highly improbable that it would, the contract did not come within the Statute. The Court said, "The Statute (of Frauds) does not apply to any contract, unless by its express terms, or by reasonable construction, it is not to be performed, that is, is incapable in any event of being performed, within one year from the time it is made.

"If by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary.

"If the agreement can be fully performed by either of the parties within the year, and it is so performed, the agreement of the other party is not within the statute, though it may be impossible to perform it within a year."

In applying the law to building contracts, the question would be whether the agreement excluded the possibility of completion within a year or not. A verbal contract for building a house, made in New York, October 1, 1828, provided that the house should be done "before the close of the year 1829." A dispute arose about the agreement, and the defendant claimed that it was void, under the Statute of Frauds. The Supreme Court decided otherwise, saying, "The agreement set forth in the declaration in this case is not for the building of a house after the expiration of one year, but is to be performed at the farthest within fifteen months. There is nothing in the agreement prohibiting the defendant from completing the contract within six months, or a shorter period. Suppose he had done so, and sued the plaintiff for compensation for his labor and materials found, would it have been permitted to the plaintiff to have said that the contract was not to be performed within a year, and therefore it was not obligatory on him? Most clearly not. And if obligatory on one party, it

"is equally so on the other. The defendant might have performed the contract within a year, and it is therefore not within the statute."

The statute law in most, or all of our States, interferes with contracts in one other way, by providing that agreements made on Sunday shall be void, whether they are in writing or not. Nevertheless, an agreement signed on Sunday, but ratified on some other day, will often be held to be valid, the question of its validity depending on the wording of the statute, and various other circumstances.

**Sunday Contracts.**

**Catlett vs.  
Tr. M. E. Ch.,  
62 Ind. 365.**

**Perkins vs.  
Jones,  
26 Ind. 499.**



## CHAPTER XX.

### MISREPRESENTATION OR MISTAKE.

**Fraudulent  
Contract not  
Binding.**

**I**T is a very common, but erroneous notion that if a man has once been inveigled into signing a contract, he cannot escape from it, even though he should find out afterward that he had been grossly deceived in regard to it. Although the law presumes that men will use ordinary caution in their business transactions, and will do nothing to relieve those who fail to do so, it fully recognizes the fact that no prudence can always protect a man against fraud, and it may be relied upon to prevent, so far as legal principles will permit, the person guilty of the fraud from gaining any advantage from it. Even where, instead of fraud, there has been only a mistake, it will generally be found that, if the mistake is clearly established, and it was not one which might have been avoided with ordinary care, the law will rectify the error, or relieve innocent parties from the consequences of it, provided this can be done without injustice to other parties, who are equally innocent, and more careful.

**Martine vs.  
Nelson,  
51 Ill. 422.**

In an Illinois case, a man brought plans and specifications to a painter, and asked him for an estimate. The painter was too busy to examine and take measurements from the plans, and the owner explained them to him. Upon these explanations the painter made a bid, which was accepted, and he sent his men to the building to begin the work. He then left town

for three weeks. On his return, he found that the work was not as explained by the owner, and that some extra work had been added, the value of all that had been done being \$900, instead of \$350, the contract price. The owner refusing to pay more than the contract price, the painter brought suit, and it was decided that the contract was invalid, by reason of the misrepresentations made as to the amount of work; and that he was entitled to recover the actual value of the work done. Moreover, in reply to the claim that the painter ought, if the work to be done proved not to be as represented, to have notified the owner before going on with it, and thereby involving the owner in a much larger expense than he had contemplated, the court decided that, having been absent from the town, he was excused from the obligation to give such notice.

It should be observed, however, that in most cases a court would insist on the necessity for giving a notice of the kind, and that the painter, if he had not happened to have so good a reason for not giving it, would have found it hard, after doing the work, to collect \$900 for a job which he knew that the owner thought he was to have done for \$350.

This principle has been expressly laid down by the courts. In two cases it has been held that, if a contract has been made for work to be done at a stipulated price, and it is discovered before the work is commenced that a misrepresentation has been made in respect to its value, the party engaging to do the work may repudiate the contract; and if he does not do so, but goes on and performs it, he can afterwards demand no more than the contract price.

It has, moreover, been decided in California that where mistake or misrepresentation in regard to the subject-matter of a contract affects only certain stipulations of a contract, as, for example, where the conditions which would affect the time of completion have been erroneously stated, only those stipulations of the contract which are affected by the error are invalidated, and the others remain in full force.

In a somewhat similar case in England, a contract was

*Martine vs.  
Nelson,  
51 Ill. 422.*

*Contractor  
Should Give  
Notice on Dis-  
covering Mis-  
take.*

*Saratoga, etc.  
vs.  
Row,  
24 Wend. 74.*

*Lloyd vs.  
Brewster,  
4 Paige 537.*

*Verzan vs.  
McGregor,  
23 Cal. 339.*

Pattison vs.  
Luckley,  
10 L. K. Ex. 330.

Contract  
may not be  
Entirely Vi-  
olated by  
Fraud.

made for building a house. After the contract was signed, it was placed in custody of the architect, who then surreptitiously made, or allowed to be made, a material alteration in it, the alteration being in the provision with regard to extras. Some extra work was done, but payment for it was refused, on the ground that the contractor had not complied with the provisions of the contract relating to such work, such compliance being, by the contract, a condition precedent to the right to recover payment. The contractor then sued for payment for the extra work on *quantum meruit*, on the ground that the contract was void on account of the alteration, or, at least, that the defendant could not avail himself of it. On trial, it was held that the contract, although altered, was still binding on the plaintiff, or, at least, might be looked at to see what the terms were, and that the plaintiff could not recover on *quantum meruit*.

## CHAPTER XXI.

### THE RIGHTS OF THE LOWEST BIDDER.

A GREAT deal of unhappiness often arises, after the award of contracts for public work, from a misapprehension, on the part of contractors, of the rights of the lowest bidder. It is very commonly supposed that the person who offers to do the work submitted for estimate for the lowest price is entitled to have it awarded to him, unless distinct notice has been given, in the invitation to bidders, that the lowest tender will not necessarily be accepted. This notion is an erroneous one. In some cases the laws of a State, or the regulations of a private or public corporation, provide that bids shall be invited for all work for the State or corporation exceeding a certain sum in value, and that the work shall be awarded to the lowest bidder; and, where this is the case, the officials in charge of the matter have no discretion; but where no such law or regulation exists, the lowest bidder has no claim to be preferred, and no notice need be given that his bid will not necessarily be accepted. In many cases, where the law or regulation on the subject, instead of saying simply that the work shall be given to the lowest bidder, provides that it shall be awarded to the "lowest responsible bidder," the discretion which the law allows the officials in judging of responsibility is so extensive that here also the lowest bidder has practically no claim to the work which he can enforce, if the officials have in good faith decided that

**The Lowest Bidder not Necessarily Entitled to Contract.**

*People vs. Croton Bd.*,  
9 Barb. 259.

*Topping vs. Swords*,  
1 E. D. Smith,  
109.

*Starkey vs. Minneapolis*,  
19 Minn. 203.

**The "Lowest Responsible Bidder."**

Commissioners  
*vs.*  
 Mitchell,  
 82 Penn. 343.

The Pitts-  
 burgh Water  
 Mains.

it would be better to give it to some one else. An instructive case involving this point was decided in Pennsylvania a few years ago. There is a statute in Pennsylvania which says that "All stationery, printing, paper and fuel used in the councils and other departments of the city government, and all work and materials required by the city, shall be furnished, and the printing and all other kinds of work to be done for the city shall be performed, under contract, to be given to the lowest responsible bidder, under such regulations as shall be prescribed by ordinance." Under this statute bids were invited by the Water Committee of the city of Pittsburgh for wrought-iron forcing mains, to be made in conformity with certain specifications. The firm of Snyder & Co. made a proposal, in conformity with all the requirements, which was \$5,000 lower than any other bid received, and accompanied their offer with a good and sufficient bond. Instead of awarding the contract to them, the Water Committee, after some consideration, awarded it to another firm, whose bid was higher. Messrs. Snyder & Co. thereupon applied to the courts for a mandamus, to compel the committee to award the contract to them. The committee, being summoned to show cause why the mandamus should not be granted, said that it "was within their full knowledge and belief" that the said Snyder & Co. on a previous occasion, "by some means or other, attempted and did perpetrate a gross deceit and wrong" upon the committee, "in surreptitiously departing from the specifications for a certain contract for the construction of boilers for the new water-works, by striking therefrom, without the knowledge or consent of the said committee, the word 'mud-drum,' " and that "it was within the knowledge of some, if not all, the members of the Water Committee that N. Snyder, the senior member of the firm of Snyder & Co., was a man of intemperate habits, whose character for sobriety was not such as would warrant the committee in giving said firm a responsible contract; that said N. Snyder also had attempted to bribe the mechanical engineer of the water-works, who was the inspecting officer of said contract," and that

Snyder & Co. were "otherwise disqualified for the proper fulfilment of the requirements of the proposed contract."

Commissioners  
vs.  
Mitchell,  
82 Penn. 342.

The court appointed a commissioner to take testimony, and found, on his report, that Snyder & Co. were the lowest bidders, and were pecuniarily responsible; and further, that the evidence did not sustain the allegation that "it was within the knowledge of the committee that Snyder & Co. had attempted or perpetrated a gross deceit or wrong" upon it; or that N. Snyder was a man of intemperate habits, or that he had attempted to bribe the engineer; but it was of opinion that the committee fully believed that these facts were true. On this finding the court held that the action of the Water Committee could not be interfered with.

The case was appealed to the Supreme Court, which confirmed the decision of the court below, saying, "The learned judge who, as the mouthpiece of the court to which this case was submitted, delivers the opinion, finds that the facts stated in the petition are true, and that the allegations contained in the answer, as above set forth, are wholly without foundation, but that, notwithstanding this, the committee fully believed that what was asserted in the answer was true. We must take this opinion of the court as to the belief of the respondents to be correct, . . . nevertheless, it does somewhat surprise us that this body of men, intrusted with so important a duty, should have rested so contentedly under a delusion which a little inquiry in the right direction would have dissipated, and thus saved a handsome sum of money to the city treasury." The Court, however, held with that below, that the word "responsible," as employed in the statute, "means something more than pecuniary ability." "In a contract such as the one in controversy, the work must be promptly, faithfully and well done; it must, or ought to be, conscientious work; to do such work requires prompt, skillful and conscientious men. A dishonest contractor may impose work upon the city, in spite of the utmost caution of the superintending engineer, apparently good, and even

Commissioners  
*vs.*  
 Mitchell,  
 82 Penn. 343.

"capable of bearing its duty for a time, which in the end may  
 "prove to be a total failure, and worse than useless. Granted  
 "that from such a contractor pecuniary damages may be re-  
 "covered by an action at law; this is at best but a last resort,  
 "that often produces more vexation than profit, a mere patch  
 "upon a bad job, an exceedingly meagre compensation, at  
 "best, for the delay and incalculable damage resulting to a  
 "great city from the want of a competent supply of water.  
 "The city requires honest work, not lawsuits. Were we to  
 "accept the interpretation insisted upon by the relators, the  
 "difference of a single dollar, in a bid for the most important  
 "contract, might determine the question in favor of some unskil-  
 "ful rogue, as against an upright and skilful mechanic. Again,  
 "we know that, as a rule, cheap work and cheap workmen are  
 "but convertible terms for poor work and poor workmen, and  
 "if the city, for the mere sake of cheapness, must put up with  
 "these, it is indeed in a most unfortunate position." . . . "It  
 "is settled beyond controversy, that where the complaint is  
 "against a person or body that has a discretionary or delib-  
 "erative function to exercise, and that person or body has ex-  
 "ercised that function, according to the best of his or its judg-  
 "ment, the writ of mandamus will not be granted to compel  
 "the undoing of what has been done."

The summary of the decision in this important case states the view of the court as follows: "The word 'responsible' in the 6th Section of the Act of May 23, 1874, has a broader meaning than is involved in the pecuniary ability to make a good contract by security for its faithful performance; and, where the term is applied to contracts requiring for their execution not only pecuniary ability, but also judgment and skill, the statute imposes not merely a ministerial duty upon the city authorities, but also duties and powers which are deliberative and discretionary; and therefore, where these authorities have exercised a discretion, mandamus will not lie to compel them to modify a decision, even though their action was erroneous, in the absence of clear proof of fraud or bad faith."

A very similar view of the law was taken by the Supreme Court of Nevada in a case of the same sort. An asylum for the insane was to be erected by the State, and the statute providing for it declared that the Board of Commissioners might adopt or reject any or all bids not deemed reasonable or satisfactory; but, in determining bids for the same work or material, the lowest responsible bid should be taken. Bids were presented for the construction of the building, that of the plaintiff being \$52,000. The Commissioners awarded the contract to another bidder, whose proposal was to do the same work, and furnish the same materials, for \$60,000. The plaintiff applied to the court for a mandamus to compel the Commissioners to cancel the award and to transfer the contract to him. The Commissioners replied to the application that they had ascertained from the testimony of skilled experts that the buildings could not be carried out as required by the plans and specifications for less than \$58,000; that the plaintiff had not the requisite means or credit for building them for less than about \$60,000; that the sureties on the bond offered by the plaintiff could not all qualify in the sums for which they proposed to become surety; and that, after laborious examination and inquiry, they concluded that the plaintiff's bid was not reasonable or satisfactory, or entirely or in any way responsible, and that the bid which they accepted was the lowest responsible one, and that they had strictly complied with the statute in accepting it. Neither fraud, negligence nor favoritism was alleged against the Commissioners.

The Supreme Court held that the statute was mandatory in requiring the Commissioners to take the lowest responsible bid, and they had no power or authority to accept any other; but, in ascertaining whether or not a bidder was responsible, they were required to deliberate and decide, and, in doing so, they exercised judicial, not ministerial functions; "and, in deciding upon the responsibility of bidders, it was their duty to consider not only their pecuniary ability to perform the contract, but it was their right and duty to inquire and ascertain

*Hoole vs.  
Kinkaid,  
16 Nev. 217.*

**A Bid Less  
than the  
Reasonable  
Cost.**



Hoole vs.  
Kinkead,  
16 Nev. 217.

"which ones, in point of skill, ability and integrity, would be  
"most likely to do faithful, conscientious work, and fulfil the  
"contract promptly, according to its letter and spirit."

Laymen will probably wonder at the penetration of a court which could discover all this depth of meaning in the seemingly simple language of the statute; but it will be found that courts in general show great respect for the decisions of honest and capable men, who may be vested with discretionary powers, and are likely to interpret statutes as favorably for them as they can. In this case the Nevada court held, summing up its decision, that "it was the right of the Commissioners to reject  
"the plaintiff's bid, and their duty to do so if, after examination,  
"it was not, in their best judgment, the lowest responsible bid.  
"The testimony showed that the Commissioners acted conscientiously, and their decision could not be disturbed."

Character  
of Bidder  
may be Con-  
sidered.

People vs.  
Dorshelmer,  
55 How. P. R.  
118.

Another example of the tendency of courts to allow the character of the bidder to be considered, as well as the pecuniary resources at his command, in determining his responsibility, is to be found in a New York decision, in which it was held that, where the law required a contract to be awarded to the lowest *bona fide* responsible bidder, the officers in charge of the matter might reject the tender of a bidder who was himself pecuniarily irresponsible, although the bond which he offered was ample.

Ross vs.  
Board of Edu-  
cation,  
42 O. S. 374.

On the other hand, a board of officials is not entitled to exercise its discretion capriciously. Where the statute provided that the lowest responsible bid should be accepted, but that the board might, at its discretion, reject all the bids, it was held that this did not authorize the acceptance of any but the lowest responsible bid; and where, under a similar statute, an award was made to the highest bidder, instead of the lowest, on the ground that his goods were the best in quality and most suitable in design, the award was held to be unauthorized.

State vs.  
Beta,  
4 C. C. 86 (Ohio).

In cases of this sort, however, a board or committee is usually allowed some discretion as to the relative value of the

articles offered by different bidders. It has been decided in Ohio that, in receiving bids for heating-apparatus, a board is at liberty to adopt a particular system before advertising for bids, but need not do so. If it advertises so as to put all systems in competition, it need not select the lowest bid, provided it selects the lowest bid for the particular system it decides to be the best; and its decision as to what system is best, if made in good faith, cannot be reviewed by the courts.

In any case, persons who bid for public work must be careful to comply with all the conditions imposed upon bidders. It has been decided in New York that, where the statute required a contract to be given to the lowest bidder, a bid not made in conformity with the conditions was not to be considered, even though it was the lowest.

Fraudulent bidding is, of course, to be avoided on moral grounds; but contractors do not always know that such bidding exposes them to temporal penalties, as well as to post-mortem torment. In two cases in New York, where one of the bidders had purchased from the others the right to bid, and had induced them to destroy their tenders, so as to secure the contract for himself at a more remunerative price, it has been decided that all combinations, of this or any other kind, to obtain the award of contracts to any other than the lowest bidder, are fraudulent, and, on discovery, the State, or other party interested, may maintain an action for damages against a bidder who secures a contract by such means.

It should be remembered, also, that the making of a bid for work does not put the one to whom the offer is made under any obligation, unless he has made some promise or agreement in relation to it. Where a man had talked about building, and had obtained some estimates, and, after he had given up the undertaking, the contractor who had submitted the lowest bid sued him for damages equal to the profit he would have made on the job, it was held that mere vague talk about building, without an agreement to give the work to the lowest bidder, did not give any claim for damages.

**State vs.  
Board of Edu-  
cation,  
20 Bull. 156.**

**Bidders  
must Comply  
with Condi-  
tions.**

**Weed, etc. vs.  
Barch,  
56 N. Y. P. R.  
470.**

**Fraudulent  
Bidding Dan-  
gerous.**

**People vs.  
Lord,  
6 Hun. 390.**

**People vs.  
Stephens,  
71 N. Y. 527.**

**Bidders  
not Entitled  
to Compensa-  
tion.**

**Boyle vs.  
Deenberg,  
74 Mich. 79.**

## CHAPTER XXII.

### THE INTERPRETATION OF CONTRACTS.

#### **Entire and Divisible Contracts.**

**I**N some of the discussions contained in the preceding chapters the distinction between an entire and a divisible contract has been briefly mentioned. In the first, one party agrees to do a certain complete piece of work, for which the other agrees to pay a definite price, no part of which is due until the whole service is performed; while, in the other, the service to be rendered is divisible, either by agreement or by inference, into separate portions, on the completion of each of which a proportionate part of the price agreed to be paid is due. An illustration of an entire contract would be found in an agreement for making a suit of clothes, under which nothing would be due unless the clothes were completely finished; and the purchaser would not be required to receive or pay for a part of the suit, while a divisible contract might be illustrated by a bargain for building ten houses, at five thousand dollars apiece, under which it would generally be held that, if only six were built, the contractor would be entitled to be paid for these.

As a point of abstract legal theory, apart from extraneous considerations, the courts usually hold that a building contract is an entire contract, and must be carried out in full to entitle the builder to any part of the contract price. A man once contracted to build a house for a fixed sum. The builder owed

the owner money on some other transactions. When the house was partly done, it happened to become necessary to adjust the accounts between the builder and the owner, and the builder endeavored to set off a part of the value of his work on the house against what he owed the owner. The Supreme Court of Colorado, however, held that, unless the contract for building the house had been entirely performed at the time of the accounting, the builder was entitled to no credit for the work done under it. In this case no time had been specified for the completion of the house, but the Court did not consider that this fact entitled the builder to payments on account, or to credit for partial service.

In a Vermont case, a builder, A., agreed to repair a house, and to complete the work by a day named, and the owner agreed to pay a certain sum "when the job is complete." When the builder had partly finished his work, he was sued by another person, and a trustee writ was served on the owner, B. A. subsequently abandoned his work, without fault on the part of B. B. was sued as trustee for A., but the Supreme Court held, in three trials of the case, that B. was not liable for anything as trustee, because the contract was an entire one, and full performance of it by A. was necessary to entitle him to payment, and that A., not having finished what he had agreed to do, was not entitled to *pro rata* compensation for what he had done.

Where, therefore, a contract consists of a simple proposition and acceptance, or fails to provide expressly for payments during the progress of the work, on account of the contract price, the contractor is not entitled to claim any such interim payments, and nothing is legally due him from the owner until he has completely fulfilled the contract; and, if he never fulfils it, the owner never owes him anything, provided his failure to complete it is not due to the fault of the owner, or to the interference of the law.

Where, however, the contract expressly provides that payments on account of the contract price shall be made from time

*Walling vs.*  
*Warren,*  
2 Colorado, 434.

*See, also,*  
*Smith vs.*  
*Brady,*  
17 N. Y. 133.

*Brown vs.*  
*Weber,*  
38 N. Y. 187.

*Kettle vs.*  
*Harvey,*  
21 Vt. 301,  
24 Vt. 515,  
33 Vt. 39.

*See, also,*  
*Strauss vs.*  
*R. R. Co.,*  
7 W. Va. 368.

**Payment on  
Entire Con-  
tract not Due  
until Work is  
Completed.**

**Provision  
for Interim  
Payments  
does not Af-  
fect Entirety  
of Contract.**

to time as the work goes on, it is sometimes questioned whether this provision does not make the contract divisible, so that the contractor, if he has completed the work up to the point at which an instalment of the price is due under the contract, may claim payment of this instalment, even though he abandons the work immediately afterwards.

There would probably be a difference between the courts of different States in their reply to this question in practical cases, but in theory it seems to be generally held that, as the Supreme Court of Ohio puts it, the provision for payment by instalments "is for the convenience of the contractor only," and does not affect the entirety of the contract, so that, strictly, if a contractor fails to complete his contract, the owner is entitled to recover back from him all the instalments that he has paid on account of the contract price, whether they have been paid in accordance with the express stipulations of the agreement, or simply as a favor. Where a builder abandons a contract, it rarely happens, in practice, that he is solvent enough to pay back the instalments that he has received, even if the owner should get judgment for them, and there are very few cases in which the attempt to collect them has been made; but the principle has been repeatedly asserted in connection with other matters, as will be seen later.

It sometimes happens that the question of the divisibility of a contract is more difficult to decide. Sexton, the contractor for the Chicago City-Hall, made his proposal as follows:

"For basement, \$15,400; for first story, \$17,300; for second and third stories, \$35,000; for fourth story, with skylight and roof, \$36,602.69, complete, according to advertisements, and according to the plans and specifications on file in the Department of Public Works of the city of Chicago, for the sum of \$105,302.69." The contract provided that payment should be made on estimates, during the progress of the work, of 85 per cent of the value of the work done and in place at the time of issuing of such estimates, the remaining 15 per cent being reserved until the final completion and

*Lumber Co. vs.*  
*Purdum,*  
41 O. S. 373.

*See, also,*  
*Grossman vs.*  
*Bonn,*  
5 Stud. 43.

*Sch. Tr. vs.*  
*Bennett,*  
3 Dutch. 513.

*Haslack vs.*  
*Myers,*  
2 Dutch. 284.

*Chicago vs.*  
*Sexton,*  
115 Ill. 230.

*See, also,*  
*Brigham vs.*  
*Hawley,*  
17 Ill. 38.

*Holmes vs.*  
*Stummel,*  
24 Ill. 370.

*Evans vs.*  
*R. R. Co.*  
26 Ill. 189.

*Dobbins vs.*  
*Higgins,*  
78 Ill. 440.

acceptance of said work. It appeared that payments were made on estimates by stories. The city, by the Mayor, who was, by the contract, entitled to do so, declared the contract forfeited, on Sexton's failure to put on roofs and skylights as called for by the original plans.

It will be remembered that the Supreme Court decided this point in favor of Sexton, holding that, as he had been shown only tracings of the plans, in which the skylights and other details shown on the original plans did not appear, his contract only required him to execute the works indicated on the tracings shown him. Sexton then claimed that, as the city had declared his contract forfeited without just cause, he was entitled to treat the whole contract as having been rescinded, and recover the market value of all the labor and materials which he had furnished by *quantum meruit*, without regard to the contract price which he might have agreed to take for them. The city resisted this claim, maintaining that, even if Sexton was entitled to recover on *quantum meruit*, on account of the rescission of the contract by the city, the contract, as agreed upon by the parties, was separable, each story forming the subject of a separate agreement, so that a rescission of one section of the contract did not disturb the remainder. The Court, however, decided against both parties, holding that the contract was not separable, but entire, and that Sexton, under the circumstances, was not entitled to recover the market price for his work and materials under *quantum meruit*, but that their value must be determined by the stipulations of the contract so far as those stipulations could be applied.

There is another point in which a contract may be divisible. Besides providing for the execution of successive portions of the work, all building contracts divide the description of the work to be done into a great number of separate stipulations regarding the class of materials and the sort of workmanship to be used in every part of the building, and such a contract, even if not separable into portions following each other successively in point of time, might be conceived as separable into

Folliott vs.  
Hunt,  
21 Ill. 654.

See, also,  
Butts vs.  
Huntley,  
1 Scam. 410.

Divisibility  
of Contracts  
According to  
their Stipulations.

*Butts vs.  
Huntley,  
1 Scam. 410.*

a number of independent agreements as to materials and workmanship, the violation of one of which need not necessarily involve the forfeiture of all. If the latter view of the subject can be taken, the contract is divisible; but, if all the stipulations must stand or fall together, it is entire.

It is obvious that the question whether a building contract is an entire one, so that the builder is entitled to no pay unless he carries it out in every particular, or is to a certain extent divisible, so that he can get something for his work, even if it is not completed exactly as the specifications require, is a very important one; and it is one on which the courts have spent a great deal of time, without, however, coming to any very definite conclusion; and it will, perhaps, make the presentation of the law on the subject more clear to refer first to the decisions which take the view most unfavorable to the builder, and then to those which incline to the opposite side, mentioning last some which endeavor, not very successfully, to adopt both views at once.

*Smith vs.  
Brady,  
17 N. Y. 173.*

The leading case on the subject in this country is that known as *Smith vs. Brady*, which was decided in the New York Court of Appeals some years ago. As the decision in this case reversed that of two courts below, and was very fully explained by the judges, it will be of advantage to describe it at considerable length, particularly as it is frequently referred to in building suits. In this case, a builder, by two agreements, contracted to furnish materials and build three cottages, with out-houses and fences, in accordance with certain plans and specifications, except where otherwise provided, in the best and most workmanlike manner, and to the entire satisfaction of certain architects named in the contract. It was further provided that their decision upon questions of extras and omissions should be final. For this work the defendant agreed to pay the plaintiff \$4,900, of which a part was to be paid from time to time as the work progressed, and the balance "when all the work should be completed and certified by the architects to that effect."

The answer to the plaintiff's petition averred that the plaintiff had not performed the covenants on his part; that the work was not done in the most workmanlike manner, or to the satisfaction of the architects; that the materials furnished were of inferior quality; that the plaintiff never procured the certificate of the architects, or either of them; and that, in regard to extras, the defendant had disputed the plaintiff's charges, and had offered to submit them to the architects, as agreed, but the plaintiff had refused to submit them.

The plaintiff, in reply, admitted that he had never procured the certificate of the architects, in consequence of the unreasonableness and frivolous objections of said architects, or one of them, in refusing to give any certificate. He admitted that the work was done, and materials furnished, except for extra work, under the contract.

The case was first tried before a referee, who found that there were omissions and deficiencies in the work and materials, and that the loss to the defendant thereby amounted to \$212.57; that the plaintiff had done extra work and furnished materials therefor, to the value of \$295; and that the defendant in June (the contract was to be completed May 1) took possession of the three cottages, without objection at the time, and appropriated them to his own use. He reported that, after making the proper allowances and deductions to the parties respectively, the plaintiff was entitled to judgment for \$1,934.43, some payments having already been made on the contract.

The defendant appealed from the decision of the referee to the Supreme Court, which approved the referee's judgment; and he then appealed to the Court of Appeals, which reversed it.

It appeared from the evidence that the specifications called for nailing-joists in the frame twelve inches apart from centres, but that they were actually placed sixteen inches from centres; also, that whereas the contract required the third floor beams to be sixteen inches apart, they were actually placed twenty-four inches apart. About 200 joists, in all the buildings,

Smith vs.  
Brady,  
17 N. Y. 173.



Smith vs.  
Brady,  
17 N. Y. 173.

besides the beams, were saved in this way. The plaintiff, to meet this evidence, produced testimony tending to show that the houses were sufficiently strong; that the joists and beams were placed at the distances customary in that neighborhood, and that the defendant was not really injured at all by this violation of the contract. No other variation from the specification is mentioned in the report, and these would probably account for the referee's deduction of \$212.57. No explanation of the omissions was given, nor was any evidence offered to show that they were not intentional.

The Court of Appeals, in reviewing the case, set itself this question: "In a building contract, where performance is to precede payment, and becomes a condition thereof, can the builder, having failed to perform on his part, recover for his work or materials, making the other party a compensatory allowance for the wrong done him, it being also a further condition of the question that the employer chooses to occupy and enjoy the erection, rather than to remove or require the builder to remove it from his premises?" The Court cited decisions both in the negative and the affirmative. In *Ellis vs. Hamlin*, tried before Chief Justice Mansfield, the plaintiff, a builder, had omitted to put into the building certain joists and other materials. Failing to prove performance of the contract, he resorted to a general count for work, labor and materials, claiming that the defendant, having the benefit of the houses, was bound at least to pay for them according to their value. "But Chief Justice Mansfield repudiated that doctrine. He said, 'The defendant agreed to have a building of such and such dimensions. Is he to have his ground covered with buildings of no use, which he would be glad to see removed; and is he to be forced to pay for them besides? To be sure, it is hard that a man should build houses, and not be paid for them; but the difficulty is to know where to draw the line; for, if the defendant is obliged to pay for one deviation from his contract, he may equally be obliged to pay for anything, how far soever distant from what the

Ellis vs.  
Hamlin,  
3 Taunt. 52.

McMillin vs.  
Vanderlip,  
12 John. 685.

Thorpe vs.  
White,  
13 John. 53.

Jennings vs.  
Camp,  
13 John. 94.

Champlin vs.  
Rowley,  
13 Wend. 258.

S. C. in Error,  
18 Wend. 187.

Paige vs.  
Ott,  
5 Denio. 406.

Pike vs.  
Butler,  
4 Comst. 360.

"contract stipulated for"; and the plaintiff was non-suited."

The Court of Appeals went on to say that "the supposed liability of a person who enters and occupies a building erected on his ground to pay the builder, although the latter failed in performing his contract, has always been referred to the general doctrine that benefits received and retained under a contract must be paid for without regard to the conditions of the contract itself. I am confident that no case can be found in which the building-contractor's right to recover has been maintained on the ground that the owner, by the mere possession and occupancy of the building, has waived the condition of performance." "In this State (New York) the sanctity of contracts, in this respect, at least, has been strictly maintained, and no encouragement has ever been given to that loose and dangerous doctrine which allows a person to violate his most solemn engagements, and then to draw the injured party into a controversy concerning the amount and value of the benefits received. . . . If the owner, having regard to strength and durability, has contracted for walls of specific materials, to be laid in a particular manner, the builder has no right to substitute his own judgment for that of others. Having departed from the agreement, if performance has not been waived by the other party, the law will not allow him to allege that he has made as good a building as the one he had engaged to erect. He can demand payment only upon and according to the terms of his contract; and if the conditions on which payment is due have not been performed, then the right to demand it does not exist."

"Cases of this kind," the Court continued, "must not be confounded with others having perhaps a slight resemblance, but no real analogy. . . . If A. should agree to make and deliver to B. a carriage of a particular kind, and should make a different one, B. may elect whether he will take it or not. Until he so elects, he has no property in the fabric. If he voluntarily accepts it, he either waives the objections which he might make to it, and is liable to pay for it under

Smith vs.  
Brady,  
17 N. Y. 173.

Smith vs.  
Brady,  
17 N. Y. 173.

"the contract, or he must pay for it on its own merits, as if there had been no previous contract. But where the owner must, in the nature of things, receive the benefit of the partial performance of the contract, he is, if the contract so provides, under no obligation to pay anything unless the contract is completed. Thus, if one engages to labor for a year, although the employer receives the benefit of each day's labor, he is not bound to pay anything if the laborer without just cause abandons his service before the year has expired. Also, if one contracts to plough twenty acres of land, and abandons the work after ploughing nineteen, he can recover nothing, although the owner plants and cultivates the nineteen acres, for the reason that the owner cannot reasonably do otherwise. . . . He is not obliged to abandon his field in order to be enabled to insist on the condition of the contract." So with building contracts. "The owner of the soil is always in possession. He is not in a situation to elect whether he will or not accept the benefit of an imperfect performance. He cannot reasonably be required to tear down the building in order to stand upon the contract, and there is no rule of law against his using it without prejudice to his rights. Moreover, as being annexed to the soil, the building is his property, and the builder would have no right to remove the brick, or stone, or lumber, after annexation, even if the employer should unjustifiably refuse to allow him to proceed with the work."

"It is true that contracts embrace a variety of particulars, and that slight omissions and inadvertencies may sometimes very innocently occur. These should be indulgently regarded, and they will be so regarded by courts and juries. But there can be no injustice in imputing to the builder a knowledge of what his contract requires, nor in holding him to strict performance. . . . If he fails to perform, when the requirement is plain, and when he can perform if he will, he has no right to call upon the courts to make a new contract for him; nor ought he to complain if the law leaves him without remedy."

The Court, therefore, held that the evidence to show that the houses, as built, were sufficiently strong, and the timbers placed at distances customary in that neighborhood, was improperly admitted, and that the plaintiff was not entitled to recover for his work and materials, even upon making to the defendant an allowance for the breaches of the contract, to be adjusted according to some principle of equity.

Smith vs.  
Brady,  
17 N. Y. 173.

Another somewhat noted New York case extends and explains the doctrine held in *Smith vs. Brady*. One Gugerty, a mason, agreed in writing to provide materials, and execute certain work "in a good, substantial and workmanlike manner, in strict conformity with plans and specifications prepared by E. J. Webb, architect," so that the house might be completed, if the carpenter should be guilty of no default, on or before a certain day. In consideration of this, the owner, Smith, agreed to pay \$5,900, by instalments, each payment to be made when the architect should certify in writing that the work had been performed which entitled Gugerty to such payment. The owner "reserved the right to alter, add or omit either workmanship or materials," and to "pay and allow a fair valued price for any addition or alteration so ordered that may add to such contractor's expense"; and he also "made it a right to claim a fair valuation for either workmanship or materials which, by a written order, delivered to the contractor by a third person, he, the owner, should think proper to have omitted." But it was agreed that "no such deviation from the original plans should impair the contract between the said parties, or destroy its binding influence or validity."

Smith vs.  
Gugerty,  
4 Barb. 614.

The owner ordered verbally a considerable amount of extra work, and also verbally directed omissions to be made. The house was not finished until long after the contract time. The architect gave his final certificate as follows: "I pronounce the houses finished, and if not literally so in every punctilio, they are done in that manner that, was I the owner, I would accept them for myself."

Smith kept back a part of the price for the contract and

Smith vs.  
Gugerty,  
4 Barb. 614.

extra work, on the ground of delay, and said also that no written order had been given for the extras, and that the architect's certificate did not set forth that the work had been performed according to the plans and specifications.

Gugerty sued for his money, and recovered it. In its decision, the Court said, "The parties to building contracts apparently differ most widely in reference to their obligations. "The builder seems to suppose that, while he adheres generally to the plan which is prescribed for him, he is at liberty "to disregard minute and unimportant particulars; while the "owner imagines that a departure from such plan in any respect, although it may be the effect of accident, and of no "possible injury to him, exonerates him from the obligation to "make any payment which is in terms made dependent upon "the full performance of the contract. Both are wrong. . . . "A substantial compliance, without any intentional variation, "should in all cases be considered as a full performance of a "condition, whether precedent or consequent."

With regard to the delay, the Court said: "Taking the old "work and the new together, Gugerty never agreed to perform "the whole within the time specified in the contract. An extension of the work called for, and justified, an extension of "time. But if there had been no additional labor, the protraction of the time, if assented to by Smith, would not impair Gugerty's claim. This assent need not be in writing," and here Smith, by making no complaint of the delay at the time, tacitly assented to it.

As to the absence of written orders for changes, although there was no positive evidence that Smith ever verbally ordered all of those made, he certainly saw them made, without objection, and ordered at least many of them himself. On one occasion, where he had given verbal orders for extra work, and Gugerty objected that the contract required a written order, and said that he had done enough without a written agreement, and should do no more, Smith called a witness, and in his presence, and in that of the architect, said, "Whatever extra

work you do for me, I will pay you for it." And the architect said, "Mr. Gugerty, that is as good as a written order to you, and I will see it right to you." The Court mentioned this evidence, and observed: "Moreover, Smith claims deductions for omissions, without proof of written orders, and the inference is clear that the parties mutually waived the provision requiring a written memorandum for extra or omitted work."

Smith vs.  
Gugerty,  
4 Barb. 614.

As to the insufficiency of the architect's certificate, the Court held that, as Smith had by his own acts, or with his consent, made it impossible for the architect to certify that the work was done according to the specifications, he could not object that the certificate was insufficient.

There are indications that the contract in this case was not drawn in the ordinary way in regard to certain points, such, for example, as the provision for extension of time in case of extra work; so that some parts of the decision would be modified, if applied to the forms of agreement which architects now generally use. However, the principles laid down by the Court are valuable, and are well summed up in the report, as follows: "Parties to building contracts should be exact in the fulfillment of their agreements, even to the smallest particulars; and if they wilfully or carelessly depart from any one of them, they should incur the penalty, however severe it may be. But if a party, while acting in good faith, and with a determination to do all that he has contracted to do, unintentionally, and without any negligence, happens in some trifling matter to vary or depart from the terms of the contract, the law is not so severe and exacting as to deprive him of all compensation. It ever regards the substantial rights of the parties, but overlooks trivial and unimportant matters.

Wilful or  
Careless De-  
partures  
from Con-  
tracts.

"Where, after the making of a building contract, additions to the original specification are made, at the request of the owner, and requiring additional time, the time limited for the completion of the contract will be deemed to have been extended, by mutual agreement of the parties, if an extension is necessary for the protection of the contractor."

Smith vs.  
Gugerty,  
4 Barb. 614.

As before observed, this doctrine would not apply to a case in which the contract itself specified in what way, and under what conditions, the time for completion should be extended, or to one which expressly provided that it should not be extended under any circumstances. In such cases, the parties having themselves agreed upon the rule by which they will be governed, the courts will not interfere with their agreement.

What Deviations are Unintentional and Inadvertent.

Just how much variation from the plans and specifications would, under this stricter theory of the entirety of a building contract, be regarded as "unintentional or inadvertent," so that the Court would still consider that the contract had been "substantially" complied with, is a rather indeterminate point, although an important one; and perhaps nothing better can be done to illustrate it than to collect a number of actual decisions, the account of which, if tedious to the general reader, will be all the more valuable to persons in need of suggestions on the subject for being somewhat minute.

Sinclair vs.  
Tallmadge,  
36 Barb. 602.

A block of stores was built under contract in New York. The city gave the contractors the wrong grades for the sidewalk, so that the stores were set a step higher than they should have been. The contractors, during the progress of the work, pointed out the mistake, and explained to the architect, and to a representative of the owner, the cause of it. No complaint or objection was then made by either. When the buildings were completed, the architect gave his certificate for the final instalment of the contract price, and a part of the instalment was paid. Payment of the balance was, however, refused, on account of the mistake in setting the buildings. The suit of the contractors for their money was carried to the Supreme Court, which decided in their favor. The Court said, "Where 'there has been no wilful departure from the terms of a building contract, nor any omission in essential parts, and the 'laborer has honestly and faithfully performed the contract, in 'all its material and essential features, he will not be held to 'have forfeited his right to remuneration by reason of mere 'technical, inadvertent and unimportant omissions or defects.

"A substantial compliance with the contract is all that is required to entitle the builder to his reward."

Where a contract had been made for altering a house, the price for the work, as fixed by the contract, being \$550, with board for the contractor and his workmen, and fodder for his horse, it appeared, after the work was finished, that the roof and chimneys were not well supported; that the folding-doors were not well hung, and their casings were not well fitted; that the tarred paper and clapboards were in some cases not well put on, and that one door and casing was set so that the door would not shut. The referee appointed by the Court found that, notwithstanding these omissions, for which he thought that \$100 should be deducted from the contract price, the contract had been substantially performed.

The owner, probably thinking that a contract could hardly be said to have been "substantially performed" by a contractor who had left out about one-sixth of what he had agreed to do, appealed, and this insignificant controversy was carried to the highest court in the State of New York, which sustained the decision of the referee.

In another case, where the amount of the contract price is not stated, the referee found that the contract had been substantially performed, but that \$150 should be deducted from the contract price as recoupment to the owner for work defectively and insufficiently performed. The owner appealed, claiming that the amount of recoupment allowed by the referee showed that the contract had not been substantially performed; but the Court of Appeals held that "the amount allowed was not such as to show that the finding of substantial performance was unsustained by evidence."

In another New York case, the contractor for a house omitted to put cornices and centres as specified in some of the rooms, and left out the hair from the deafening mortar; and one of the stone lintels was imperfect; but the referee found that the contract had been substantially performed, and his decision was sustained.

*Woodward vs.  
Fuller,  
80 N. Y. 512.*

*Johnson vs.  
De Feyster,  
50 N. Y. 606.*

*Heckman vs.  
Pinkney,  
81 N. Y. 211.*



Nolan vs.  
Whitney,  
88 N. Y. 643.

In another instance, there were defects to the value of \$200 in certain plastering, the whole amount of the contract being \$11,700. The architect refused, on account of the defects, to give a final certificate, but the referee found that the contract had been substantially performed, and that the contract price should be paid, deducting \$200 for the defects. The fact that the architect's certificate was not produced, as required by the contract, the referee accounted for by finding that it had been unreasonably and improperly refused. The Court of Appeals sustained the decision of the referee, both as to the substantial performance of the contract, and the right of the plaintiff to recover without the certificate of the architect, saying that "an unreasonable refusal on the part of the architect in such a case to give the certificate dispenses with its necessity."

Moll vs.  
Foery,  
43 Hun, 476.

On the other hand, where a man in New York agreed to strip the earth from a certain area of quarry land, and abandoned the job, leaving a strip from three to five feet wide unfinished, and when the owner asked him to come back and complete his work refused to do so, it was held that, the work having been intentionally left unperformed in a substantial particular, he could recover nothing for what he had done; and where a contract had been made to construct a building in a good, substantial and workmanlike manner, for a certain price, to be paid on the completion of the building, but the contractor built it so unskilfully that the walls were unsafe, and could not be made safe without rebuilding a considerable portion, estimated at two-fifths of the whole, and the owner refused to accept the work, it was held that the contractor could recover nothing.

Pullman vs.  
Corning,  
14 Barb. 174.

Bixby vs.  
Williamson,  
25 Minn. 481.

In Minnesota, one Bixby agreed with Williamson to build a brick party-wall along the line between them, one-half to be on land of each; the cellar wall to be of stone, and the wall above to be of brick, 70 feet long, 28 feet high and 12 inches thick. The price was to be paid when the wall was completed. Bixby built the wall as agreed, except that at the front of the wall, above the basement, he put a stone pilaster 13 feet high,

16 inches wide and 10 inches deep. Williamson refused to pay for the wall, on the ground that it had not been built as agreed; and was sustained by the Supreme Court, which held that the building of the wall in this manner was not a compliance with the contract, so that Bixby could recover the price.

Bixby vs.  
Williamson,  
25 Minn. 481.

This seems like a rather hard case, especially as Bixby appears to have been equally interested with Williamson in the wall, and to have put the pilaster in front as a portion of a stone façade which he expected to join with Williamson in building at some future time; but all Courts, even where the milder theory of the law prevails, are disposed to look with disfavor on intentional variations from the agreement; and in another Minnesota case it was held that "The doctrine of "substantial compliance with building contracts does not apply "when the omissions or departures from the contract are "intentional, and so substantial as not to be capable of remedy, "and that an allowance out of the contract price would not "give the owner essentially what he contracted for." In this case, the builder, by fraudulent collusion with the superintendent, cheapened the building by omissions of work contracted for. The Court held that there could be no recovery, either for whole or part performance, although the owner had taken possession and was occupying the building.

Elliott vs.  
Caldwell,  
43 Minn. 357.

In Kansas, as in Minnesota, the stricter view appears to be held. A man contracted to put down 2" x 6" sills for a sidewalk. He actually put down 2" x 4" sills of pine. In a suit to recover the value of what he had done, on *quantum meruit*, the Supreme Court held that he could recover nothing.

Denton vs.  
Atchison,  
34 Kan. 438.

In Michigan, the law appears to be in a rather uncertain condition. A builder in that State made a contract for the erection of a church. In the course of the work he made the following changes from the plans and specification: 1. Instead of fifteen windows, he put in only thirteen. 2. Instead of one-and-one-half-inch flooring, he used one-and-one-fourth-inch. 3. Instead of two-inch doors, he put in doors one and three-fourths inches thick. 4. Instead of four posts under

Masters vs.  
Houck,  
39 Mich. 431.

*Masters vs.  
Houck,  
39 Mich. 431.*

the gallery, he put two. 5. Instead of three-by-eight studding throughout, he used some two-by-eight studs.

There was some reason to suppose that the change in the number of windows was agreed to by the church authorities; but no order was given for the other changes. When the building was done, the church authorities refused to accept or pay for it. The contractor sued for the contract price, less the cost of making good the deficiencies, this being what is generally allowed by the Courts in those States where the stricter view of the entirety of building contracts is not held. The Supreme Court held, however, that, whereas, the law of Michigan is that a man should pay for that of which he has taken the benefit, even though it is not just what he contracted for, yet "a man cannot be compelled to take and use one thing, when he bargained for another, and declines to receive the substitute tendered."

*Allen vs.  
McKibbin,  
5 Mich. 449.*

The decision to which the Court referred as establishing the law in Michigan on the subject was one given in a case where a man agreed to cut all the pine timber off an eighty-acre lot, pile it in a certain way on the bank of a creek, and remove the obstructions between the piles and the creek, for a certain price. He did not cut all the pine timber, and did not pile the logs in the manner agreed, or clear away properly the obstructions between the piles and the creek. Payment for the work was refused, on the ground that the contract had not been fulfilled. The plaintiff sued to recover on *quantum meruit*, claiming the contract price, less what it would cost to complete the contract. The defendant introduced evidence to show that the work was not worth the contract price. This evidence was excluded by the Court below, which charged the jury that if there had been a partial performance of the contract, from which the defendant derived benefit, the plaintiff was entitled to recover the contract price, deducting any damages which the defendant had sustained by reason of non-performance. It will be observed that this is just what was claimed by the contractor's counsel in the later case; but the Supreme Court, in

the earlier one, rejected this theory, holding that the charge to the jury in the court below and the exclusion of the evidence offered were both erroneous. The judges said, in their decision, "When a party fails to comply with an agreement, "unless it is apportionable (or divisible), the rule is well "settled that he cannot sue upon the agreement, or recover "upon it at all. And under the strict common-law rule he "was remediless. But the doctrine has now grown up, based "upon equitable principles, that where anything has been done "from which the other party has derived substantial benefit, "and which he has appropriated, a recovery may be had upon "a *quantum meruit*, based on that benefit. And the basis of "recovery is not the original contract, but a new implied "agreement, deducible from the delivery and acceptance of "some valuable service or thing. . . .

Allen vs.  
McKibbin,  
5 Mich. 449.

"Taking this as the basis of recovery, there certainly could "be no good reason for allowing a party who is in default to "recover in any case more than his work or goods may be "worth; for that would allow him to speculate out of his own "fraud or default; and he should not be allowed more than "the same could be obtained for from any one else. To allow "him the contract price for what is worth much less would not, "in any sense, be allowing a *quantum meruit*."

The Court laid down its rule for such cases as follows:

"The defaulting plaintiff can in no case recover more than "the contract price, and cannot recover that if his work is not "reasonably worth it, or if, by paying it, the rest of the work "will cost the defendant more than if the whole had been "completed under the contract. The party in default can "never gain by his default, and the other party can never be "permitted to lose by it; and the price thus determined is the "true amount recoverable on a *quantum meruit*."

In support of this view, the Court quoted an English decision, which says, that "In some cases, a special contract, not "executed, may give rise to a claim in the nature of a *quantum meruit*; e. g., where a special contract has been made for

Allen vs.  
McKibbin,  
5 Mich. 449.

"goods, and goods sent, not according to the contract, are retained by the party. Then a claim for the value on *quantum valebant* may be supported; but then, from the circumstances, a new contract may be implied."

The report of the early Michigan case does not make it quite plain, but it seems as if the logs were cut on land of the defendant. If so, there is an essential difference between this and the question presented to the English Court. In the latter, the defendant, on receiving goods differing from those which he had ordered, might have sent them back, and he would then owe the plaintiff nothing, while the plaintiff would owe him reimbursement for whatever damage might have been caused by the failure to deliver the goods ordered; but, having free choice as to what he should do, he chose to keep the goods sent him, and might reasonably be assumed to have, by that act, made, by implication, a new contract to pay for them. With the owner of the logs in Michigan, so far as can be judged from the report, the case was quite different. His trees had been cut down in a way which he did not wish, and had not contracted for; he could not have them replaced on their stumps, nor could he be expected to throw away his property. His only recourse was to take it and make the best of it; and his position was therefore quite unlike that of the buyer of goods, who is free, either to put himself back into the condition in which he was before the contract was made, or to take different goods in place of those agreed upon; and exactly similar to that of the owner of land on which a house has been built in violation of the contract, but who, not being able to abandon his land, or clear the building off it, has not that freedom of action which would seem to be, by the more logical reasoning of *Smith vs. Brady*, necessary to the creation of a new implied contract. In *Martin vs. Houck*, the Court seems to have interpreted the earlier decision according to the stricter view, but there are other cases in Michigan where some uncertainty appears to be shown.

In Pennsylvania, the law on this subject is laid down in the

case of *Miller vs. Phillips*. A contract between Miller & Phillips provided that Phillips and another should build a three-story brick house for Miller, for the sum of \$1,200; \$100 to be paid when the cellar was walled, and the rest when the house was finished. It was also agreed that the building should be executed agreeably to certain plans and specifications annexed to the contract, and should be finished by the following April. The contract was dated October 16. In February, the contractors had erected and roofed in the building, but it was so badly constructed that it could with difficulty be made to sustain a roof; and the person employed to plaster it abandoned his work and refused to proceed, for fear that the walls would fall down. The work was then suspended, and on February 28 Miller gave written notice to the contractors that he intended to hold them to full and faithful compliance with the contract; that the building as erected was not a good and substantial building, nor as contemplated by the contract. He specified that the materials, or most of them, were bad, and the house not built in a workmanlike manner; that it was so loosely and inartificially erected that it would be absolutely dangerous to occupy it. He said, further, that the contractors must understand that he did not intend to take any such building off their hands; but if the contract was not completed at the proper time, and in the proper manner, he would hold them responsible for all damages that he might suffer in consequence of its non-fulfilment.

On April 27 Miller was informed that the contractors were about to pull down a portion of the walls and rebuild them, and gave them the following notice:

MECHANICSBURG, 27th April, 1857.

MESSRS. PHILLIPS & KING:—

*Gentlemen*,— You appear determined to persist in going on with the house you commenced for me, under an article of the 16th of October, 1856, notwithstanding the constant and repeated notices that I have given you that I will not take it off your hands, and that I consider our contract at an end. You appear determined now to tear down part, and rebuild. I therefore again notify you that I have no contract with

*Miller vs.  
Phillips,  
31 Penn. St. 218.*

Miller vs.  
Phillips,  
21 Penn. St. 218.

you for that purpose; that I consider our contract of the 16th of October, 1856, at an end on the 1st of April, 1857; that I will take no house that you may now build, fix or patch up off your hands; but that I will hold you responsible for damages for a non-compliance with your contract. You are also hereby notified to remove all materials belonging to you off my lot, as I want the immediate possession of it; otherwise I will be compelled to bring an action against you. Respectfully yours,

JOHN MILLER.

The contractors, notwithstanding this notice, went on, and pulled down and rebuilt two of the walls, including part of the foundation, and proceeded to finish the house, which was completed in July, 1857, and Miller appears to have taken possession and occupied it. They then brought suit on the contract, alleging that the house was now a good and substantial building, and finished according to the contract.

The witnesses for the contractors testified that the house was now "a good common job," while the witnesses for Miller said that it was built in an unsafe, unskilful and unworkmanlike manner. The plaintiffs were allowed to show that the weather during the construction of the building was very severe. The Court below gave judgment for the plaintiffs for \$750.

On appeal, the Supreme Court reversed the decision. It said: "The contract in this case was entire, and recovery must rest on performance, or not be allowed at all. If there be no performance within the time, the contract may be rescinded. If there be substantial performance, with only minor deficiencies, it may not be. If there be defective, negligent or worthless performance, it can only be placed in the category of non-performance; to be treated, as in fact it is, as no performance or part performance whatever. . . . After the time was out . . . Miller gave them notice not to proceed any farther, that on account of their worthless compliance with their contract he chose to rescind it, and he gave them an opportunity to place themselves *in statu quo*, by inviting them to remove their material from the premises. Under the facts disclosed by the evidence, he had a full right to do so, and it was necessary, if he wished to protect himself

"from being liable for what they might do thereafter. It was a case in which the undisputed evidence showed that there was no performance, not merely a case of imperfection, but of total deficiency, so far as they had gone, and the work must be done over again to be of any value as a dwelling-house. The employer was not bound in law or morals to give them another trial of their care and skill. Notwithstanding the notice, they proceeded with the work, and finished it, as already stated, about the first of July. Having disregarded their contract, and the notice of their employer, they proceeded, at their peril, to rebuild the house. And if the evidence on another trial shall make out that the work done between the 16th of October and the 1st of April was done in an unskilful and negligent manner, and it was not a substantial compliance with the contract, they will not be entitled to recover in this suit.

*Miller vs.  
Phillips,  
31 Penn. St. 218.*

"We think that the principle of recovery laid down by the learned judge (of the court below) — that if it was a house inferior to what the contract required, but of value to the defendant, the plaintiffs might recover — was quite too liberal to insure full performance by contractors. A work, . . . though radically defective, might be esteemed of value to the employer, and if he should, upon this rule, be bound to pay for it, it would be a virtual substitution of one thing for another, a liability to pay for what was not contracted for, and a failure to obtain what was the object of the stipulation. The law calls for honest, substantial performance, regardless of trifling defects, when passing upon that question, and the judgment of men will always determine what will be a sufficiently close compliance with the requirements of the stipulations to insure substantial justice.

"The unfavorable state of the weather," the Court said, "if it may be fairly presumed to have had the effect, against all due diligence of the party, to delay his operations, may, in many cases, be evidence; . . . but as the contractor takes the risk of the season when he undertakes to perform work



"at an unfavorable time it should be received with great caution, and only in aid of a clear equity on his part. He must have done his whole duty before it should be allowed to mitigate damages in his favor."

Walworth vs.  
Finnegan,  
33 Ark. 751.

See, also,  
Robinson vs.  
Snyder,  
25 Penn. St. 203.

In Arkansas the law has been stated as follows: "Where there is an entire contract for work, at a stipulated price for the whole, and part only is performed, there can be no recovery; but if accepted, or if the work necessarily enures to the defendant's benefit, the plaintiff should recover the contract price less the amount necessary to complete the work."

Even where the work done costs more than that contracted for, the person who does the work runs a serious risk of not being able to get his pay for it, if the deviation from the contract was intentional. A contract was once made for the erection of a saw-mill, to be 50 feet wide and 100 feet long. The contractor, for reasons of his own, built it 100 feet long and 78 feet wide. When it was done the owners refused to pay for it. The plaintiff proved that, as built, the mill cost more, was of greater value, and was better adapted to the purpose for which it was to be used than it would have been if built according to the contract. The Court rejected all these representations, and held that the structure was not a substantial compliance with the contract, and nothing could be recovered.

Swain vs.  
Seamans,  
9 Wall. 254.

Boxarth vs.  
Dudley,  
15 Vr. 304.

In a New Jersey case, the judge, in giving his decision, made an admirable comparison of the doctrines held by the courts of different States on the subject.

In this case, a contract had been made for the erection of a house, in accordance with certain plans and specifications, for the sum of \$26,880. The house was not built as specified, and the owner made some changes. After the house was completed, suit was brought by the builder for \$13,005.74, as balance due under the contract and money due for extra work. The owner refused to pay it, on the ground that the contract, which was under seal, was entire, and that, as the work had not been done according to the contract, or accepted by him,

nothing was due. It was proved that the roof leaked on account of the specification not having been followed, and there were other serious variations from the contract, which were not denied by the contractor; but the owner had occupied the house and given some evidences of having virtually accepted it. The judge before whom the case was tried instructed the jury that the plaintiff might establish his claim in this form of action either (1) by proof that the contract had been, by the agreement of the parties thereto, so deviated from as to evince that the contract was abrogated or abandoned, and that the work directed by the owner was done under another and implied contract; or (2) by proof that the defendant, notwithstanding substantial discrepancies between the building as completed and that required by the contract, accepted and retained the same, and derived benefit therefrom. In regard to the first point, however, the attention of the jury was directed to the meagreness of the evidence in relation to it, and the judge observed to them that, as the contract itself provided for deviations and changes of plan, they could not properly draw the conclusion that the contract was abrogated merely from such deviations and changes.

In regard to the second point, the judge explained that "Where a defendant has accepted the work and materials furnished by a plaintiff, has taken possession of and derived benefit from such work and materials (although there was a special contract) under such circumstances as amount to acceptance, the law implies a promise on the part of the defendant to pay such remuneration as the benefit conferred on him is reasonably worth, and, to recover that quantum of remuneration, an action of *indebitatus assumpsit* is maintainable." "This rule," the judge said, "applies to buildings on land of the defendant, as well as to mere personalty. The principal question is, if there has been acceptance of the building by a defendant. Mere naked occupation of a building erected on the land of the owner does not, by itself, waive the special contract unless the possession is coupled with some act or some

Bozarth vs.  
Dudley,  
15 Vr. 304.

*Bozarth vs.  
Dudley,  
15 Vr. 304.*

language from which acceptance and acquiescence may be reasonably inferred." The jury were required to find whether, in the present case, the house had been thus virtually accepted by the owner, and found, from the evidence, that it had been. The Court thereupon gave the plaintiff judgment for his claim, deducting \$300 as the amount to be allowed for the deviations from the contract.

The defendant appealed to the Supreme Court, objecting, through his counsel, particularly to the charge of the judge to the jury in the court below about the virtual acceptance of the building. In regard to this, the judges of the Supreme Court, in their final decision, said: "It will be at once perceived that "the consideration of the subject brings up several of the "vexed questions respecting the rights and liabilities of parties "to a contract for the erection of buildings on land. Such a contract deals with a subject-matter of a peculiar nature. When "an agreement for the manufacture of a chattel out of materials furnished by the maker is not performed according to "its terms, the remedy of the party for whom it is made seems "perfect, and the rejection of the chattel, while completely "protecting him, does no injustice to the maker, for it leaves "in his hands the materials with which his labor has been "united. But when, under a contract for building, labor and "materials of the builder are put into an edifice immovably "affixed to the lands of another, and the title to which goes "with such lands, the right of rejection, while it may be said, "theoretically, to exist, is difficult to enforce in practice without apparent injustice to one party or the other. If the "building be wholly unlike that contracted for, the owner is "put to the delay and expense of removing it from his land, "which it encumbers. If, as is more usual, the building is "not so unlike that contracted for as to permit the owner to "feel reasonably justified in removing it, or if he is driven "by necessity to use the shelter of the building, and if, by "protest and rejection, he may escape payment, yet, if the "building adds anything to the value of the land, eventually he

"or his heirs become benefited thereby. These considerations  
"have led to some contrariety of judicial views, as cases with  
"differing circumstances have been presented.

*Bowarth vs.  
Dudley,  
15 Vr. 304.*

"There is a line of cases, of which *Ellis vs. Hamlin*, decided  
"at *nisi prius* by Chief Justice Sir James Mansfield, and  
"reported in 3 Taunt. 53, and *Munro vs. Butt*, 8 El. & Bl.  
"738, in which the judgment of the Queen's Bench was  
"delivered by Lord Campbell, are examples. They hold that  
"when the contract remains open and unperformed, though in  
"slight particulars, no recovery can be had, either upon it, or  
"upon an implied contract. This line of cases was elaborately  
"reviewed by Judge Comstock in *Smith vs. Brady*, 17 N. Y.  
"173, and contrasted with cases in the New England States,  
"which seem at variance therewith.

"The rigor of this rule has been frequently modified. Thus,  
"we find another line of cases holding that recovery upon  
"such and similar contracts will not be refused for mere  
"technical, inadvertent or unimportant deviations from the  
"terms, but that whenever there has been a substantial com-  
"pliance with the contract recovery may be had thereon, a  
"proper allowance or reduction from the contract price being  
"made for deficiencies. See *Glacius vs. Black*, 50 N. Y. 145;  
"2 Addison on Contracts, Sections 864, 865; *Cutler vs. Close*,  
"5 C. & P. 337; *Dallman vs. King*, 4 Bing. N. C. 105;  
"*Stadhard vs. Lee*, 3 B. & S. 364.

"A like variance of judicial views exists in cases where the  
"contract has not been so performed as to justify a recovery  
"thereon even under the modified rule above stated. On  
"examination, we shall find two classes of cases permitting a  
"recovery under such circumstances, as upon a *quantum*  
"*meruit*. One class adopts the view that recovery should be  
"had in such cases whenever the work and materials are of  
"any value to the owner of the lands to which they have been  
"affixed, and that the proper measure of damages is the con-  
"tract price, deducting therefrom so much as the house was  
"worth less on account of variations from the contract. This

*Bozarth vs.  
Dudley,  
15 Vr. 504.*

“is the view of the Massachusetts courts, as expressed by Chief Justice Parker in *Hayward vs. Leonard*, 7 Pick. 180; *Smith vs. First Congregational Church*, 8 Pick. 178; and “see also *Snow vs. Ware*, 13 Met. 42; *Atkins vs. Barnstable*, “97 Mass. 428; *Fitzgerald vs. Allen*, 128 Mass. 232.

“The other class presents the view adopted by the Supreme Court of the United States in *Dermott vs. Jones*, 2 Wall. 1, “which holds that while a contractor guilty of fraud, or having “wilfully abandoned the work unfinished, cannot recover in “any form of action, he may recover in *assumpsit* when he “has, in good faith, done work which, though not done accord- “ing to the contract, has been accepted by the owner. In this “event, it is also held that the recovery is to be founded, as to “amount, upon the contract price, making such deductions as “required by the contractor’s deviation from the contract.

“These cases do not differ so much as at first appears. In “the Massachusetts cases, the conclusion is put upon the “ground of a practical acceptance of the building on the part “of the owner. Thus, speaking of the distinction between the “manufacture of a chattel and the erection of a building, Chief Justice Parker, in *Hayward vs. Leonard*, says: ‘In “such case the owner of the land necessarily becomes the “owner of the building. . . . though the owner may at first “refuse to occupy, he, or his heirs or assignees, will eventu- “ally enjoy the property.’ He also declares that in cases of “a gross and fraudulent violation of the contract, as, for “example, where the building is wholly variant from the “contract, no recovery can be had except upon an express or “implied acceptance. He confines the rule to cases where “there has been an honest intention to go by the contract, and “a substantial execution of it, with variations comparatively “slight.

“In each class of cases, acceptance is the basis of recovery. “One class, however, requires the acceptance to be actual; “the other assumes it to exist in all cases where value has “been conferred upon the property, and there has been no

"gross or fraudulent violation of the contract; when such  
"a violation occurs, actual acceptance is necessary to re-  
"covery. . . . In *School Trustees vs. Bennett*, 3 Dutch. 513,  
"this Court declared the necessity of an entire completion of  
"such a contract as a condition precedent to the right to pay-  
"ment of the contract price; but this action was upon a  
"guaranty for the performance of a contract by a builder, who  
"had, though paid part of the price, wholly failed to complete."

*Bozarth vs.  
Dudley,  
15 Vr. 304.*

"The rule most agreeable to the principles governing con-  
"tracts is, it seems to me, this: When a contract for erecting  
"a building has not been so performed that a recovery can be  
"had thereon, a recovery in *assumpsit* upon the common  
"counts for work and materials furnished in the erection will  
"only be permitted when the owner has actually accepted the  
"building erected. The view that assumes acceptance from  
"the mere fact that the edifice adds value to the land on which  
"it stands, in my judgment, unduly restrains the force of the  
"contract of the parties, and deprives the owner of the right  
"to reject an edifice not in substantial conformity with its  
"terms. If thereby any apparent injustice seems done to the  
"builder, in retaining the materials put upon the property, it  
"is the result of his own default, to which he must submit.

"Such acceptance by the owner may be express, or implied  
"from his conduct. It seems well settled that mere occupancy  
"of the building by the owner, while appropriate, is neither  
"presumptive nor conclusive evidence of acceptance. The  
"reason is obvious. The building belongs to the owner of  
"the land on which it stands. As was said by Lord Campbell  
"in *Munro vs. Butt*, the owner cannot be appropriately said  
"to take possession of the building, for he has not been out of  
"possession of that which is thus affixed to his own land."

The jury in the court below having found that the building  
had been accepted by the owner, it seemed, on the theory of  
the Supreme Court, that the contractor was entitled to recover  
something; but the judge said that the deduction of \$300 from  
the plaintiff's claim, which the Court below made, was not large

*Bosarth vs.  
Dudley,  
15 Vr. 304.*

enough in view of the circumstances, and a further deduction must be made of \$3,000, with interest from the time that the building was to have been completed, amounting in all to \$4,790. If the plaintiff, he said, would remit \$4,790 of the verdict which he had obtained in the court below, it might stand for the remainder.

*Freeb. Ch. vs.  
Hoopes,  
66 Md. 598.*

In Maryland, as in New York and New Jersey, the stricter view of the law seems to prevail. The Hoopes Artificial Stone Company agreed to cover a church with artificial stone, warranted not to come off, and to be of a gray color, like a certain sample. The work was done, but the coating proved not to be like the sample, and was streaked and spotted. The church people refused to accept or pay for the work; and the Supreme Court held that they were not bound to do so.

*Pinches vs.  
Swedish Luth.  
Ch.,  
55 Conn. 183.*

In New England, as has been before observed, the law is, in theory, more favorable to people who fail to comply with building contracts. A contractor in Connecticut agreed to build a church according to certain plans and specifications. Partly by his error, and partly by that of the architect employed by the church, the ceiling was made two inches lower than the plans required; the windows were made shorter and narrower; the seats were made narrower, and there were other variations of minor importance from the contract. The church authorities called attention to these changes and objected to them, but occupied the building when it was done; claiming, however, that a deduction should be made from the contract price equal to the cost of making the structure conform to the plans and specifications. This would involve almost the entire rebuilding of the church, and the contractor appealed to the courts. The inferior court decided practically in favor of the contractor, holding that he was entitled to receive the contract price, deducting from it, not the cost of making the building conform to the contract, but only the amount of the diminution in the value of the building due to the deviations from the contract. The case was appealed to the Supreme Court, and was finally decided by a majority of the

full bench, three judges holding that the decision of the Court below was correct, and two dissenting.

The judge who delivered the decision said in explanation of it, "In cases where only some additions to the work are required to finish it according to the contract, or the defects in it may be remedied at reasonable expense, it seems proper to deduct from the contract price the sum it will cost to complete it." But the judge said, "In the present case, the result of the plaintiff's labor and materials is a structure adapted to the purpose for which it was built, but which cannot be made to conform to the special contract except by an expenditure which would probably deprive the plaintiff of any compensation for his labor."

In a previous Connecticut case, decided by the Supreme Court, the Court laid down the law as follows: "If a contract is carried out in good faith, but with deviations from the specification, the builder can recover to the extent of the benefit conferred, having regard to the contract price for the entire work"; and the reporter in another case amplified this statement of the law by adding that, "this means, deducting from the contract price what it would cost to make the work comply with the contract; or, if that is difficult or impracticable, deducting a fair valuation of the reduced value, with damage shown to have been suffered."

The principal Massachusetts case of the kind is *Hayward vs. Leonard*, which was decided in 1828, but has served ever since as the precedent to be followed by the Massachusetts courts. In this case, the Chief Justice, Parker, laid down the law as follows: "The point in controversy seems to be this: whether, when a party has entered into a special contract to perform work for another, and to furnish materials, and the work is done, and the materials furnished, but not in the manner stipulated for in the contract, so that he cannot recover the price agreed by an action on that contract, yet nevertheless the work and materials are of some value and benefit to the other contracting party, he may recover on a *quantum*

*Pinches vs. Swedish Luth. Ch.*,  
55 Conn. 183.

*Blakeslee vs. Holt*,  
42 Conn. 226.

*See, also, Smith vs. Ridge Sch. Dist.*,  
20 Conn. 318.

*Sch. Dist. vs. Dauchy*,  
25 Conn. 530.

*Hayward vs. Leonard*,  
7 Pick. 180.

*See, also, 1 Stephens, N. P.* 306.

*Thornton vs. Place*,  
1 Mood. & Rob. 218.

*Moulton vs. McOwen*,  
103 Mass. 591.

*Smith vs. Lowell Cong. Ch.*,  
8 Pick. 177.



Powell vs.  
Howard,  
109 Mass. 192.

Veazie vs.  
Hosmer,  
11 Gray, 396.

Walker vs.  
Orange,  
16 Gray, 193.

White vs.  
Quincy,  
97 Mass. 430.

Blood vs.  
Wilson,  
141 Mass. 25.

Yeats vs.  
Ballentine,  
56 M. 530.

Eyerman vs.  
Mt. Sinai,  
61 M. 489.

"meruit for the work and labor done, and on a *quantum vale-*  
"bant for the materials. We think the weight of modern  
"authority is in favor of the action, and that on the whole it  
"is conformable to justice that the party who has the posses-  
"sion and enjoyment of the materials and labor of another  
"shall be held to pay for them, so as in all events he shall lose  
"nothing by the breach of contract. If the materials are of a  
"nature to be removed, and liberty is granted to remove them,  
"and notice to that effect is given, it may be otherwise. But  
"take the case of a house or other building fixed to the soil,  
"not built strictly according to contract, but still valuable, and  
"capable of being advantageously used, or profitably rented —  
"there having been no prohibition to proceed in the work  
"after a deviation from the contract has taken place — no ab-  
"solute rejection of the building, with notice to remove it from  
"the ground; it would be a hard case indeed if the builder  
"could recover nothing.

"And yet he certainly ought not to gain by his fault in vio-  
"lating his contract, as he may, if he can recover the actual  
"value; for he may have contracted to build at an under price,  
"or the value of such property may have risen since the con-  
"tract was entered into. The owner is entitled to the benefit  
"of the contract, and therefore he should be held to pay in  
"damages only so much as will make the price good, deducting  
"the loss or damage occasioned by the variation from the con-  
"tract."

In a case in Vermont, a man agreed to build a wall, of cer-  
tain dimensions, at a given price. A part of the wall was not  
built to the height stipulated, and the owner refused to pay  
anything for it. The Supreme Court held that the contractor  
was entitled to the contract price, less the cost of making the  
work conform to the contract, and any additional damage  
caused by the contractor's failure to comply with the agree-  
ment.

In California, the curious conclusion has been arrived at  
that the two views of the law set forth in the preceding por-

Gilman vs.  
Hall,  
11 Vt. 510.

See, also,  
Dyer vs.  
Jones,  
8 Vt. 205.

Morrow vs.  
Huntoon,  
25 Vt. 9.

Joelyn vs.  
Morrow,  
25 Vt. 185.

tions of this chapter are really harmonious. In an action for the contract price of labor and materials, the Court below instructed the jury that if the defendant received any benefit from the work he was liable to the extent of the benefit he had received; deducting from the contract price any damage that he might have sustained by omissions or defects in the work; and that if he was injured more than he was benefited, or was not benefited at all, by reason of such defects or omissions, the jury should find for him; and it gave another instruction, that if the plaintiff and defendant had entered into a contract the plaintiff must show a substantial compliance with the terms of the contract on his part before he could recover. The defendant's counsel appealed from the decision of this Court, on the ground that the two instructions given to the jury were inconsistent with each other; but the Supreme Court held that they were not inconsistent, and, together, they stated the law correctly.

There are a few more cases, which may be considered under this head, in which the question to be decided relates to the work which the law assumes to be included in a building contract, where the specifications and plans are silent on the subject.

In most instances, the answer to this question is determined by local custom, but, as has been before mentioned, custom, to have the force of law, must not only be generally known to persons engaging in building contracts, but must be reasonable in itself.

In Missouri, a custom has been proved, and accepted by the Supreme Court, that, in measuring stonework for the laying, doors and windows should be measured solid, and corners twice, and a decision given accordingly in a suit by contractors for their pay.

In Maryland, the same custom has been proved and accepted, with the additional one, that curved work should be measured at one and one-half times its actual length; but it is unsafe to rely too much upon the legal validity of customs in the trades, which, as architects know, often vary greatly in different towns in the same State.

*Hunt vs.  
Elliott,  
77 Cal. 588.*

**The Courts  
on Local Customs.**

*Haynes vs.  
Second  
Baptist Ch.,  
88 Mo. 286.*

*Fitzsimmons  
vs.  
Christian  
Brothers,  
81 Mo. 37.*

*Patterson vs.  
Crowther,  
70 Md. 124.*

*Walls vs.  
Bailey.*  
49 N. Y. 461.

In New York, a plaintiff was allowed to prove in the lower court that it was the custom in Buffalo for plasterers to charge for the full surface of walls to be plastered, without deduction for baseboards, cornices, or doors and windows; and evidence that the defendant had no knowledge of this custom at the time of contracting was excluded. The defendant's counsel appealed, claiming that that evidence in regard to the custom should not have been admitted; that the custom was unreasonable in itself, and that the defendant ought to have been allowed to testify that he had no knowledge of it when the contract was made. The Court of Appeals held that the evidence of the custom was proper, and that the custom itself not unlawful or unreasonable, and raised a presumption that the defendant contracted with reference to it. As to the direct testimony of the defendant, that he did not know of it, however, the Court held that it ought to have been admitted, one judge dissenting.

*Plasterers'  
Measurement.*

*Jordan vs.  
Meredith.*  
3 Yeates, 318.

On the other hand, it has been held in Pennsylvania that "A custom of plasterers to charge half the size of the windows at the price agreed upon for work and materials is unreasonable and bad."

*Sweeney vs.  
Thomason.*  
9 Lea, 359.

In Tennessee a man agreed to pay \$8.00 per thousand for brick "in the wall." A controversy arising about the payment, evidence was offered that it was the custom among masons to determine the number of bricks in a wall by measurement, rather than by counting. This evidence was held by the Supreme Court to be inadmissible.

*Ricker vs.  
Cutter.*  
8 Gray, 248.

*A "Brick  
House."*

In a Massachusetts case, a man contracted to build "two brick dwelling-houses," to be similar to a certain other house. The "certain other house" had a wooden extension kitchen, and the contractor refused to build similar extensions to the new houses, on the ground that they were not included in his contract. The question, which certainly presents some difficulty, was brought before the Supreme Court, which decided that wooden extensions, such as existed in the house specified as the model, were to be regarded as included in a contract for brick dwelling-houses.

A New York contract provided that "the provisions of the building-law will be complied with in the construction of the buildings herein described, whether the same are herein specified or not." It turned out that the law required the erection of fire-escapes on the buildings, although nothing was said about them in the specifications; and the Supreme Court decided that they were included in the contract. A very similar decision has been given in Pennsylvania.

It is quite common for architects to stipulate in their contracts that the contractor shall comply with all the directions of the Inspector of Buildings, or his deputies, and that these directions shall be regarded as part of the contract. As these directions have not been given at the time of signing the contract, and no one knows what they may be, it is sometimes claimed, by the amateurs of fine-spun theories in regard to matters of law, that they cannot form a part of the subject-matter of a contract, and that the stipulation referring to them is void. The Courts, however, hold a different opinion. A firm once contracted for some railroad work, including the stations, which were to be built "after such plans and dimensions as may be adopted by the engineer." Preliminary plans were shown for the stations, as well as for the other work, at the time of the signing of the contract. When the time came for building the stations the engineer called for larger and more expensive buildings than those shown in the preliminary drawings, and the contractors claimed additional pay for them. The Supreme Court of Connecticut held that the contractors took the risk of deviations by the engineer from the original scheme in this, as well as other particulars, and, no bad faith being shown toward them, they were not entitled to extra compensation.

Sometimes courts have to decide upon the meaning of single words or phrases, and their definition is of importance as a precedent. Thus it is often necessary to know what point in the construction of a building shall be considered the commencement—whether this shall be held to be the setting

*De Kay vs.  
Bliss,  
42 Hun, 589.*

*Mittnacht vs.  
Wolf,  
6 Pa. (St.) 44.*

*Cannon vs.  
Wildman,  
28 Conn. 472.*

*"Commence-  
ment."*

*Mutual Benefit  
Ins. Co. vs.  
Rowand,  
11 C. E. Gr., 389.*

*Jacobus vs.  
Mutual Benefit  
Ins. Co.  
12 C. E. Gr., 604.*

of the batter-boards, the beginning of the digging, or the laying of the first stone. The New Jersey Supreme Court seems to be the only one which has had this word called to its attention, and it has in two cases decided that the "commencement" of a building is the beginning of the excavation.

"Erection."

*Johnston vs.  
Ewing, etc.,  
35 Ill. 518.*

In a similar way, there is sometimes a controversy over what should be understood by the "erection" of a building, some persons claiming that it means the completion of the structure, while others suppose it to mean something else. A man in Illinois once subscribed \$400 toward a building for a university, on condition that a building worth a specified sum should be erected within a certain time. At the expiration of the allotted time the walls were up, excepting the chimney and one gable; but the roof was not on, nor were the floors laid, although the materials for the roof and floors, as well as windows, and some other work, were on the ground. The intending benefactor of the university refused to pay his subscription, on the ground that the building had not been erected within the specified time; but the Supreme Court held that erection did not mean completion, and that a building was erected when the walls were up and materials were on the ground to finish it, and that he must pay the money. Similar

*McLaughlin vs.  
Child,  
62 Ind. 412.*

*Common-  
wealth vs.  
Squire,  
1 Met. 258.*

*Hastings vs.  
Aiken,  
1 Gray, 163.*

"As Directed."

*Lancaster vs.  
Conn.  
92 Mo. 460.*

Where the common expression is used in a specification — that certain work shall be done "as directed" — there has been a dispute as to whose "directions" were intended, and it has been decided by the Missouri Supreme Court that the "directions" meant are those of the owner.

A question as to what is meant by a clause describing the mode of delivering stone has been decided by the United States courts. A contract once specified that granite for

building should be delivered "on and around the site." The contractor delivered it at one corner of the site, and the Court held that this was not a compliance with the agreement.

**McGowan vs.**  
U. S.,  
21 Ct. of U. 476.

In another case, a contract was made for some "earth excavation." The contractor found, after the work had proceeded a little way, that the material to be removed was "hard-pan," this being the name given by laborers to a compact, clayey gravel, which is generally so hard as to require breaking out with a pick before it can be removed with a shovel. The contractor sued for extra payment for the work, on the ground that hard-pan was not earth, and was not included in his contract; but the New York Court of Appeals decided that the term "earth excavation" included hard-pan.

**Earth Ex-  
cavation.**

**Dickinson vs.**  
Po'keepsie,  
75 N. Y. 85, 77.

In a very similar case, a man agreed to excavate a ditch for seven cents per cubic yard, "in full compensation for the excavation, back-filling, etc." This would have been a low price if the excavation had been all in earth, but, in fact, a large part of it had to be made in hard-pan and rock, and this part was worth from seventy-five cents to one dollar per yard, instead of seven cents. The contractor sued for an extra price for this part of the work, but the Court held that he could recover nothing beyond the contract price, and that he could not be permitted even to introduce evidence outside of the contract to prove the value of excavation in hard-pan and rock. The Court said: "It was the duty of the contractor to have ascertained the nature of the soil before entering into the contract. Ordinary diligence would have enabled him to do so."

**Sherman vs.**  
Mayor of N. Y.,  
1 N. Y. 316.

In a Missouri case, the contract provided that "all the exterior walls" should be faced with selected face-brick. The owner claimed that this included the fire-walls above the roof; but the Supreme Court decided that these were not included in the term "exterior walls" as used in the contract.

**Ittner vs.**  
St. Louis Exp.,  
97 Mo. 562.

There is often trouble in deciding what is meant by the common expression in contracts, that a given dimension shall be "not less" than a given number of feet or inches. In all

**"Not Less."**

*Anderson vs.  
Meislahn,  
12 Daly, 149.*

cases a Court would look sharply at the wording of the contract, to see whether a contractor really meant to bind himself to make the dimension greater, without extra charge, if the architect, or some one else, should so direct, or if circumstances should render it advisable; but if it should not appear that he intended so to bind himself, its decision would probably follow that given in a New York case, where the contract provided that the builder should excavate the cellar to a depth of "not less than ten feet." It appeared, after the excavation was commenced, that it would be necessary, on account of the nature of the soil, to carry it to a greater depth than ten feet, in order to secure a proper foundation. The builder claimed that the excavation below the ten-foot level and the additional stonework required to bring the foundation walls up from the deepened trenches were extra work, and was sustained by the Supreme Court, which decided that he was entitled to additional pay for them.

*What is  
Implied in  
Regard to  
Materials.*

*Van Hoven-  
burgh vs.  
Lindsay,  
1 Alb. L. J. 122.*

An important rule, as defining the general implied understanding in building contracts, was laid down by a New York court, and reported in the *Albany Law Journal* as follows:

"In every contract for the furnishing of materials and the performance of the work, in the absence of special provisions, there is an implied agreement on the part of the party who is to perform the work and furnish the materials that they shall not be of an insufficient and inferior description and value, and that the work shall not be totally inadequate to answer the purpose for which it was undertaken to be performed; and, though the agreement was that a specific sum should be paid for the work and materials, the claim may be reduced by showing that the work and materials were of an insufficient description and value, or it may be wholly defeated by showing that they were totally inadequate to answer the purpose for which they were to be furnished."

If, however, the law is strict in this respect, it is also reasonable. A specification once provided that "the best lumber" should be used in a certain building. As not unfrequently

happens in such cases, the builder and the owner thought differently as to what "the best lumber" meant, and the Supreme Court of Colorado had to be called upon to decide the question, which it did by saying that "the best lumber" must be construed to mean the best lumber of which buildings are ordinarily constructed at that place.

It may sometimes happen that the builder is obliged by circumstances to use certain materials, and he may save himself from responsibility for them by giving proper notice. In a Mississippi case, a man contracted to build a wall, using certain materials. He told the owner that the materials were bad, but said that he would do as well as he could with them. The owner was often present while the wall was being built, and saw the work and materials. Six months after the completion of the wall, it was found to have been so much affected by the weather as to be worthless. The owner refused to pay the price agreed upon, but the Supreme Court held that the contractor was entitled to recover.

In a similar case in New York, where the contract required the builder to use in the masonry sand taken from the premises, and the work turned out to be defective, on account of the bad quality of the sand, it was held that the owner could not claim damages for these defects. Whether the builder gave notice to the owner, before using the sand, that it was unsuitable, does not appear from the report, but it would, at least, be the part of prudence to do so in similar cases.

Before leaving the subject of what the law assumes in matters relating to materials, it may be well to mention two other cases where different points are covered. In one of these the ownership of old materials was the point involved, and the Court held that, "If the owner of land covered by houses enters into a contract for the erection of other buildings on the same land, and does not provide for the use of the materials of the old buildings in the new, or does not remove them before the contractor takes possession under his contract, he will waive the right to them, and they will belong to the contractor."

*McIntire vs.  
Barnes,  
4 Col. 288.*

*Collins vs.  
Money,  
4 Miss. 11.*

*Sand.*

*McLane vs.  
De Leyer,  
56 N. Y. 612.*

*Old Materials.*

*Morgan vs.  
Stevens,  
6 Abb. N. C.  
(N. Y.), 356.*



Vermont St.  
M. E. Church  
vs.  
Brose,  
104 Ill. 208.

In the other case, a contract was made for the erection of a stone church. The contract said, in one place, "stone for front and footings to be furnished by the owners," but stipulated, in another place, that the contractor was to furnish "all materials." The agreement further provided that the work should be fully and faithfully performed in a skilful and workmanlike manner, to the full and complete satisfaction of the architect or his assistant superintendent.

Natural  
Bed.

The architect did not visit the work while in progress, but, after the building was done and occupied, he came to see it, and refused to accept it, ordering that a large portion of the stonework of the front should be taken down, and rebuilt with larger stones. The church people also refused to make the final payment, alleging, not only that the work had not been executed to the satisfaction of the architect, as the contract required, but that the work was bad, inasmuch as the stones of the facing had not been laid on their natural bed, and, moreover, that the contractor owed them money for the stone which they had furnished for the front and footings.

The Supreme Court held that the two apparently inconsistent clauses in the contract relating to the furnishing of stone should be construed that the owners were to furnish the stone for the front and footings without cost to the contractor. The church people claimed that they only meant that the owners should furnish stone, to be paid for by the contractor; but, as it was proved that they had furnished the stone without asking for any pay, and had said nothing about expecting to be paid for it until after the building was completed, the Court considered that this was good evidence that such payment was not really contemplated in the contract.

As to the claim that the work was not done to the satisfaction of the architect, the Court held that the contract did not require that it should be done to the satisfaction of both the architect and the superintendent, but only to that of either, and, as the superintendent had seen the work going on, and had made no objections, his approval was implied. The

contract provided that payment should only be made on the certificate of the architect or superintendent, and on their estimate of the value of the work done, but, as the superintendent had never given any certificate, or made any estimate, yet instalments of the contract price had been paid without them, the Court held that this amounted to a waiver of the condition made by the contract precedent to payment, and that no certificate of satisfaction need be shown, either from the architect or superintendent. The contractor had applied to the superintendent for a final certificate, but the superintendent put him off, telling him to wait until the church was dedicated, and he should be paid. This was brought up to show that the contractor had not complied with the contract provision as to certificates, but the Court held that the action of the superintendent raised the presumption that the work had been done to his satisfaction, and decided that recovery could be had without further certificate.

The claim of the church, that the stone should have been laid on its natural bed, was supported by the testimony of experts, who gave evidence that good workmanship, such as was demanded by the contract, required that it should be so laid; but it was proved that the stone furnished by the owners could not well have been laid on the natural bed, and that the superintendent directed that it should be laid with the bed vertical. It does not appear that the specification required the stone to be laid on the natural bed, and the Court, influenced, probably, by evidence that the work was in other respects good, decided that it was not necessary under the contract.

A contract once provided that materials should be furnished to a certain amount, "more or less," according to specifications and requirements. A controversy arose as to the quantity of materials which must be furnished under this stipulation, and it was held in New York that it required delivery and acceptance of only what was needed, and not of any definite quantity.

The courts of the United States have been called upon to define the meaning of the word "Plastering," about which

Vermont St.  
M. E. Church  
vs.  
Brose,  
104 Ill. 208.

"More or  
Less."

Callmeyer vs.  
Mayor,  
83 N. Y. 118.

"Plaster-  
ing."

*Mellen vs.  
Ford,  
28 Fed. Rep. 639.*

there is often some uncertainty. A contract was made requiring certain "plastering" to be done for a fixed price. The specification, under the general head of "Plastering," mentioned "Deafening," "Lathing," including wire-lathing, and "Plastering." The contractor claimed that his agreement did not require him to do the work described under the titles of "Deafening" and "Lathing," but the Court held that every thing included under the general head was included in his contract, and said that no ambiguity was raised by the double use of the term "Plastering."

**Quantities.**

A point of serious importance in the interpretation of contracts is often that relating to quantities. Every architect knows that it is common abroad to have schedules of quantities of the labor and materials which will be required for the construction of a proposed building made out from the plans and specifications, and that bidders for the work, or any part of it, are usually allowed to use these schedules.

In England, these bills of quantities are usually made up by a quantity-surveyor, independently of the architect, and, in any case, the work of making them is paid for as a matter quite distinct from the architect's five per cent. Sometimes, the owner pays directly for the bills of quantities, but it is more common to stipulate that the successful bidder shall pay for them, the owner thus paying for them indirectly, as, of course, the bidders add the amount of the quantity-surveyor's commission to their bid. This system has not worked very satisfactorily in England, although the custom of furnishing bills of quantities is of very long standing. Repeated decisions have established the fact that neither the quantity-surveyor, nor the owner, nor the architect is responsible for the correctness of the bills of quantities, which are always held to be simple estimates, not guaranties. Moreover, as quantity-surveyors are human, and do not wish to get themselves into trouble with the builder who pays their bill, it is said to be customary among them, where there is any uncertainty or difficulty about the plans and specifications, to add a substantial

margin for contingencies to their estimate, so that the actual work performed under the contract is often much less than that provided for by the bill of quantities, and the builder, consequently, profits, at the owner's expense.

The result of these uncertainties is that the great contractors, not wishing to rely for their information as to the exact amount of work to be performed on the average quantity-surveyor's estimate, even with such deduction as experience has shown that they can safely make from his figures, generally make their own measurements and estimates, and throw aside entirely the surveyor's quantities, although they pay him for making them; and the owner consequently pays, in the end, for making both estimates.

In this country, although efforts are made from time to time by the contractors in the great cities to require owners or architects to furnish them with bills of quantities, the custom has never obtained any real foothold. There are, however, cases in which, for one reason or another, quantities are taken out, and most of our large cities possess one or more professional quantity-surveyors, who find enough to do, either in estimating quantities from plans, or in measuring work after execution, to give them a living, and it is probable that, in cases of controversy, the courts would apply to them the rules which are applied to their brethren across the water by the English courts.

In one of the English cases, the Court was of opinion that, "it is not a usual course for architects to prepare specifications of the exact quantity of work to be performed by contractors, but, if they do prepare such specifications, they ought to be in detail, to enable parties to judge, not only of the gross quantities, but also of the quantity of labor to be employed." In this case, the quantities prepared by the architect turned out to be inadequate, and the contractor endeavored to make the owner responsible for their correctness, but failed, the Court holding that the architect was not acting as the owner's agent for warranting their correctness.

*Kemp vs.  
Rose,  
4 Jur. N. S. 919.*

Scrivener vs.  
Pask,  
1 L. R. C. P. 715.

Ellis vs.  
Hamlen,  
3 Taunt. 52.

Stevenson vs.  
Watson,  
4 L. R. C. P. D.  
148.

Williams vs.  
Fitzmaurice,  
3 H. & N. 844.

"Specifica-  
tions Hereto  
Annexed."

N. E. Iron Co.  
vs.  
Gilbert,  
91 N. Y. 153.

In another case, the architect had prepared quantities, and represented to the builder that they were correct, and the latter made a tender in accordance with them, which was accepted, and a contract signed. When the work came to be done, the quantities proved to be too small, and a much larger amount of work was done than had been contemplated. The builder sued the owner for additional pay for the extra labor and materials which he had been obliged to provide, but lost his case. The Court held that his contract was for the erection of the building, including everything reasonably necessary for its completion, not for furnishing the materials and labor estimated in the bill of quantities. In regard to the claim that there was an implied warranty on the part of the owner of the quantities taken out by his architect, the Court held that there was no evidence that the architect acted as the owner's agent in taking them out, or that the owner guaranteed their accuracy, and decided that the builder could recover nothing more than the contract price.

In another case, the Court said that the builder was presumed to understand his business, and to know, independent of estimates made by the architect, what quantities would be necessary to carry out the work, and that he therefore undertook the work at his own risk, notwithstanding the bill of quantities.

As a rule, the specifications are referred to in the more formal part of the contract as constituting a part of the agreement, and it is very common to refer to them as "the specifications hereto annexed," or "the specifications signed herewith." In such cases, it is of interest to know that actual annexation of the specifications to the contract is not necessary to their validity as a part of it, and that a court, on ascertaining what were the specifications intended by the parties, will consider them as constructively annexed to the agreement.

So with signatures. Although the contract may refer to the specifications as being signed, the actual signature is not

required, if the documents meant can be otherwise sufficiently identified.

A curious case, involving the interpretation of a rather obscure specification, was decided in Massachusetts a few years ago. A written agreement, signed by a firm of builders and the agent for the owner of a piece of land, contained only a promise by the builders "to furnish all stock and materials of every name and nature mentioned in the specification, or necessary for the proper performance of the work so shown or described, and under the superintendence of X., architect, and identified by the signatures hereto." Reference was also made in the agreement to "the apartment building to be erected" on the land, to the beginning and pushing of the "work" to completion, and to payments estimated on "the value of work and material," to be made by the owner's agent to the builders upon the architect's certificate that "the terms of this contract are complied with." The specifications, which were identified, said in one place, "The work to be left clean and whole and warranted tight, including roof, for two years"; and in another place, after describing the roofing, gutters, etc., said, "All to be guaranteed for one year from completion of the building." After the completion of the building the roof leaked, and four hundred dollars' worth of damage was done to the decoration, which the owner insisted that the builders should repay. Suit was brought on this claim, but decided by the Supreme Court against the owner. The ground for the decision seems to have been purely technical. The Court said that, according to the strict reading of the written contract, the only promise of the defendants was "to furnish certain stock and materials." The specification, although referred to in the contract, must be considered as qualifying it only for the single purpose of showing what the stock and materials were to be. The agreement was the same as if the description in the specification of the stock and materials had been incorporated in the signed contract, but no part of the specifications, except the description of the stock and materials, formed a part of

White vs.  
McLaren,  
151 Mass. 553.

Warranty  
of Roof.

*White vs.  
McLaren,  
151 Mass. 553.*

the contract. Apart from the specifications, however, certain expressions in the agreement, such as those relating to payments, referred to "work," and the Court said that, "While "the promise of the defendants is meagre in its language, enough "appears in its language to show that they were to erect a "building"; but the Court thought that this was not enough to bind them to special provisions of the specifications, such as those requiring warranty of the roof. If the expressions of the specification, the Court said, in regard to warranty of the roof, etc., had been contained in the contract, they might have been held to be a collateral express warranty which would continue in effect, one for one year and the other for two years, after the completion of the building. "The trial" (in the court below) "proceeded on the theory that, collateral to "the stipulations as to the nature and quality of the roof, there "was an express warranty that it should continue in good condition for at least one year. In this, we think, there was "error. Using the specifications merely to show what kind of "work and materials were called for, their effect in this part is "to bind the defendants to construct a roof of such a sort as "would remain tight for two years. When the building was "completed and the plaintiffs took possession of it, the defendants did not remain under a contract of continuing warranty "that gave them any rights, or created against them any liabilities as to the care or condition of the roof during that "period; but if the roof was not such as was called for in respect to materials and workmanship which could be relied "upon to prevent leaks for two years, the plaintiffs might "recoup from the contract price, as damages, the difference "between the value of the building as constructed and what "it would have been if the house had been built according to "the contract"; or they might bring an action to recover back the difference. . . . The principle is, "How much less is the "building fairly worth than it would have been if the contract "had been performed?"

It is to be observed that this singular release of the

contractors from the obligations laid down in the specifications appears to have been due entirely to the slip in the written contract, which made only a part of the specifications applicable to the agreement.

Occasionally, however, the clause in the specifications requiring the contractor to warrant a portion of the work is so carelessly drawn as to fail of its intended purpose, even without any obscurity in the contract. An agreement was once drawn up, which, instead of stipulating that the contractor should warrant the roof tight, and should be responsible for all damage that might be caused by leaks during the term of the warranty, provided that the contractor should warrant the roof "to stand well and resist the water, and make a tight roof for the term of five years." The roof did not "stand well," but leaked, and the interior of the building and articles stored there were injured. The owner claimed damages to the extent of his loss, but the Supreme Court of Massachusetts held that he could recover nothing for the injury to his goods or to the interior of the building, but only the cost of having the roof put into a satisfactory condition.

Another case illustrating the extent of the responsibility of a contractor under a warranty clause is to be found in the Maine reports. A man slated a church roof, and warranted it tight for ten years. Before the ten years expired, several leaks appeared. One of these leaks was acknowledged to be due to the fault of the owners, and the contractor, on a claim being made against him for damages, resisted it, on the ground that, as the injury was partly due to the fault of the owners, he ought not to be held responsible for the remainder of the damage, under the doctrine of "contributory negligence," so familiar in its application to accident cases, which holds that, in order to hold a person responsible for injury to another by negligence, the person injured must himself have been exercising due care. The Court, however, rejected this application of the doctrine, and held that the contributory negligence of the owners did not preclude them from recovering damages

*White vs.  
McLaren,  
151 Mass. 553.*

*Goddard vs.  
Barnard,  
16 Gray, 205.*

*Pothier on  
Obligations,  
P. 1, c. 2, art. 3.*

*Hadley vs.  
Baxendale,  
9 Exch. 341.*

*Fox vs.  
Harding,  
7 Cush. 516.*

*M. E. Parish  
vs.  
Clarke,  
74 Maine, 110.*



caused by leaks not due to their fault, for which the contractor was responsible under his agreement.

**Tinning.**

*Vadney vs.  
Person,  
27 Hun, 226.*

It may be of interest, before leaving the subject of roofs, to know that, in New York, where a contract was made for "carpenter-work and materials," it was held that the tinning of the roof, not being specified under this head, should not be regarded as being, by implication, a part of the "carpenter-work and materials" agreed upon.

**Orders.**

Although not strictly belonging to the interpretation of contracts, it will be well here to refer to the decisions of the Courts in regard to the orders, which, whether recognized by the contract or not, are frequently given by the builder to his creditors, to enable them to obtain from the owner money which would otherwise be payable to the builder; and this may be followed by some illustrations of the position of sub-contractors.

Orders drawn on the owner by the contractor are usually accepted by the owner if he is willing to pay them on the contractor's account, but this acceptance does not relieve the contractor from any of the conditions upon which he would himself be entitled to the money. The law, as stated in Massachusetts, is that "Orders drawn by the contractor on the owner, payable when the contract has been completed to a certain point, and accepted by the owner, cannot be collected when the contractor has abandoned his contract before completing it to the specified point, and it has been completed by the owner at a cost greater than the sum which would be due the contractor if he had completed it, unless the owner has practised force, fraud or collusion against or with the contractor."

*Linnehan vs.  
Matthews,  
149 Mass. 29.*

*Newhall vs.  
Clark,  
3 Cush. 376.*

*Somers vs.  
Thayer,  
115 Mass. 163.*

*Gray vs.  
James,  
128 Mass. 110.*

*Farquhar vs.  
Brown,  
132 Mass. 340.*

This principle seems to be very strictly maintained in Massachusetts. The contractor for a church once gave orders on the owners, which were accepted by them, with the proviso that they should be "payable when the work is accepted by the Church." Before the completion of the building, the tower was found to be defective, and was taken down, and its

completion abandoned by mutual consent. The owners, although they agreed with the contractor that he should not be compelled to rebuild the tower, claimed that the defect which made it necessary to do so was the result of the contractor's fault, and they accordingly retained some of the money which, according to the terms of the contract, would have been payable to him on the completion of the work. The building was, however, finished without its tower, and occupied for religious services. The persons to whom the contractor had given orders claimed payment from the church authorities, on the ground that the work had been "accepted by the Church," this having been the condition of payment stipulated by the church authorities in their acceptance of the orders. The Supreme Court held that if the defect which led to the demolition of the tower was due to the contractor's fault, and not, as the contractor claimed, to the defective character of the plans, the action could not be maintained, notwithstanding the occupancy of the building by the church society.

In a Michigan case, a man accepted a contractor's order, with the qualification, "It is understood that the dwelling shall be completed before this draft is paid." The contractor who had given the order failed to complete the building within the contract time, or any time, and the owner finished it himself. The cost of completing the building used up all the unpaid balance of the contract price, so that there was nothing payable to the contractor, and therefore nothing applicable to the payment of the order. The holder of the order, nevertheless, sued the owner, claiming that as the dwelling was now "completed," the acceptance was valid; but the Court held that the "completion" referred to in the acceptance could only mean the completion contemplated by the contract, and decided that the terms of the acceptance had not been complied with.

In another case, an order was accepted, "to be paid when the house is finished." Neither the contractor nor the owner finished the house, but it was sold in its unfinished state, and completed by the purchaser. The holder of the order claimed

*Proctor vs.  
Hartigan,  
143 Mass. 462.*

*Duffield vs.  
Johnston,  
96 N. Y. 389.*

*Ferguson vs.  
Davis,  
66 Mich. 678.*

*Robbins vs.  
Blodgett,  
124 Mass. 279.*

payment from the former owner, under the acceptance, but it was refused. There was no evidence that the former owner had suffered any damage from the house being unfinished, and it was held that the payee of the order was entitled to recover.

**Sub-con-  
tractors.**

The position of sub-contractors is defined to a great extent by the contract between the owner and the principal contractor, but there are cases in which certain points, which are not covered by the principal contract, have to be decided by the courts.

In practice, perhaps the most important of the principles so determined is that sub-contractors are bound in all respects by the terms of the principal contract, unless some express exception is made in their favor with the consent of the owner. Thus, where the agreement with the principal contractor provides that orders for extras shall only be valid when given in writing, it has been held that sub-contractors can recover nothing for extra work done on verbal orders given to them. Circumstances might, however, affect the decision in such cases. Thus, where, after the agreement with the principal contractor had been signed, the plan was changed, without the knowledge of the sub-contractor, and the principal contractor absconded, leaving the sub-contractor unpaid, it was held that the sub-contractor was entitled to recover from the owner compensation for work done without written orders, although the principal contract required that orders for extra work should be in writing, and the architect had refused to give such orders.

As the owner is bound to the sub-contractor only under the terms of the principal contract, so the principal contractor can cite the contract to protect himself against transactions between the owner and the sub-contractors which he has not authorized. In a case where the owner had advanced money to a sub-contractor, and had charged the amount to the account of the principal contractor, it was held that the principal contractor could only be charged with what had been advanced by his authority.

*Green vs.  
Jackson,*  
68 Georgia, 250.

*Fireproof  
Building Co.  
vs.  
First N. Bk.,*  
54 N. Y. Sup.  
Ct. 511.

*Shaw vs.  
First Bap. Ch.,*  
44 Minn. 22.

*Fitzgerald vs.  
Beers,*  
81 M. A. 356.

*Mineral Point  
R. R. Co. vs.  
Keop,*  
22 Ill. 9.

As to the extent to which the principal contractor is responsible for the acts of his sub-contractors, there is some uncertainty in the law. To the owner, the principal contractor is undoubtedly responsible for the acts of the sub-contractors, but the case may be different with regard to the public. It has been held in New York that the principal contractor for tearing down a building is not liable for injuries caused to a person passing by falling material, at a time when neither he nor his men were at work on the building, the only persons at work there being sub-contractors or their men; and it was also held that the principal contractor, under these circumstances, was under no legal obligation to adopt precautionary measures for the protection of passers-by, that duty devolving on the sub-contractors who were actually at work; but the general tendency of the decisions seems to be to hold the principal contractor responsible for damage caused by the negligence of the sub-contractors.

*Eccles vs.*  
*Darragh,*  
48 N. Y. Sup.  
Ct. 506.

*See, also,*  
*Wilson vs.*  
*White,*  
71 G. o. 506.

*Homan vs.*  
*Stanley,*  
66 Penn. St. 464.

*Gray vs.*  
*Fullen,*  
5 B. & 70.

*Bast vs.*  
*Leonard,*  
15 Minn. 304.

*Sherman*  
*Bates,*  
15 Neb. 19.

## CHAPTER XXIII.

### HOW CONTRACTS MAY BE MODIFIED.

Agreement  
or Waiver.

Supplement  
ary Agree-  
ments.

**W**HILE a contract, once entered into, will be enforced by the courts, if necessary, with a strictness which sometimes unpleasantly surprises builders of the easy-going sort, there are various ways in which the persons who have made the agreement can, by mutual accord, set it aside, or modify it. In general, the methods by which a contract may be modified, or wholly or partially annulled, may be divided into two, agreement and waiver. By the first method, the change to be made is considered by the parties to the contract, either at the time of making the contract, or subsequently, and provision made for the change by mutual understanding. In very many cases, the original contract contains provisions for the modifications that are likely to be made, such as additions to, or deductions from, the work to be done, extension of time of completion, and so on; but if it does not contain such provisions, supplementary agreements may be made, in modification of the original contract, which will have equal force with it, and will be interpreted in connection with it. It is held by most courts that an agreement in modification of a contract may be verbal, and will still be valid, even though the original agreement was in writing, unless the original contract expressly provides that no modification shall be made except in writing; but there are exceptions to this. For example, the rules applying to the

validity of contracts with corporations, which were described in their appropriate chapter, apply equally to any modification of such contracts, and those who are interested in such agreements should see, if any modifications are to be made in them, that the changes are made with the necessary formality, or they may suffer for their carelessness. In the case of contracts under seal, also, a special rule is followed by some courts, which say that, "while a simple contract reduced to writing may be varied or changed in any way by a subsequent verbal agreement, it is otherwise as to contracts under seal, which cannot be varied by a mere parol contract, whether in writing or not, since such a contract is inferior to the original." The origin of this distinction is probably to be found in the idea that a sealed document expresses stipulations entered into with such extreme solemnity and care that they should not be allowed to be set aside by the less deeply pondered conclusions of an ordinary agreement; but, as contracts with corporations are almost always under seal, and those with private individuals are very frequently so, the point should be borne in mind. In practice, the distinction appears to be a technical one, but even a technical mistake in the conduct of a lawsuit may cost an honest claimant a large sum. A man once contracted under seal to build two houses for the defendant, and to have them ready on a certain day, for five hundred pounds. The evidence showed that the parties, by a parol agreement, had extended the time of completion, and the houses were completed within the extended time, though not within the time originally set. The contractor sued for the contract price, alleging fulfilment of his agreement. His counsel was too good a lawyer to claim that the parol agreement could vary the terms of the sealed contract, but he argued that it was such evidence of performance that the defendant was estopped to say that there had not been substantial performance, within the terms of the original agreement. The court, however, held that there was no performance, and that the evidence did not support the declaration. In a somewhat similar case, which was also decided against

**Changes in  
Contracts  
with Corpo-  
rations.**

**Contracts  
Under Seal.**

*Sherwin vs.  
Rut. & Bur.  
R. R.,  
24 Vt. 347.*

*Porter vs.  
Stewart,  
2 Aiken, 417.*

*Little vs.  
Holland,  
3 T. R. 590.*

*Phillips vs.  
Rose,  
8 Johns. 393.*

*Little vs.  
Holland,  
3 T. R. 590.*

*Heard vs.  
Wadham,  
1 East, 619.*

the claimant, on technical grounds, Lord Kenyon said that the parol agreement might be sufficient whereon to found an action of assumpsit, but it could not be the foundation of an action on a covenant under seal, whereby the parties had bound themselves to perform a different contract.

*Delacroix vs.*  
*Bulkley,*  
13 Wend. 71.

So in this country, where it has been held that "A contract sealed cannot be rescinded or released by a parol agreement." In Illinois, however, it has been decided that a contract, even under seal, may be changed by a subsequent verbal agreement to pay an additional sum for the same work and materials mentioned in the original, and the written contract will then remain in force, except as to the price to be paid; and if the work is done under the same, it will be binding.

*Cooke vs.*  
*Murphy,*  
70 Ill. 96.

**Implied  
Agreements  
for Changes.**

In cases of the ordinary sort, the question whether there was any actual agreement between the parties to modify the original contract is often an important one. As we have seen, an agreement may be implied, so that a man may be held as strictly to a bargain to which his assent can be inferred only from his acts, as if he had written out its terms and signed them, provided that his acts give unmistakable evidence of his intention, and that the other party has not agreed that no bargain between them shall be valid unless expressed in writing.

*Bartlett vs.*  
*Stanchfield,*  
148 Mass. 394.

*See, also,*  
*West vs.*  
*Platt,*  
127 Mass. 367-72.

*O'Donnell vs.*  
*Clinton,*  
145 Mass. 461-3.

Even such an agreement may not wholly exclude the validity of verbal or implied modifications of an existing contract. In a Massachusetts case, where a written contract for building said that extra work should only be paid for if executed in accordance with a written order, and the builder sued for payment for work done on merely verbal orders, the Supreme Court said that "Attempts of parties to tie up by 'contract their freedom of dealing with each other are futile.'" "The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiff and defendant, 'no doubt, but it cannot be assumed, as a matter of law, that 'the contract governed all that was done until it was renounced in so many words, because the parties had a right to

"renounce it in any way, and by any modes of expression "they saw fit." In this case, most of the extra work was done after the completion of the original contract, and, in regard to that which was done before the completion of the main contract, and which consisted in building drains, it was proved that the defendant asked the plaintiff to build the drains, and promised to pay for them; so that the question before the court was not whether the proviso of the original contract, requiring written orders for extra work, should be disregarded, so much as whether the stipulation should be considered as extending over subsequent and independent work, which was not thought of when the original contract was made.

In a Nevada case, the evident intention of the parties has been permitted to overrule the written agreement on another ground. In a contract between a building-committee and a builder, it was stipulated that changes might be made from the plans, "on request of the building-committee, provided the extra price, or deduction in price, for the same is mutually, or by arbitration, agreed upon before such a change is made." Changes were ordered and made, but the price for them was not agreed upon as the contract required. The evidence showed that the contractors were willing to agree upon a price, and urged the building-committee to fix it, but the committee refused, continuing, however, to order changes. The Court held that this conduct amounted to a waiver of the clause inserted in the contract for the owners' benefit.

The United States Courts hold a similar doctrine. In a suit against the Government, to recover pay for extra work, where the contract provided that no claim should be made for extra work unless first agreed upon in writing, it was held by the Court of Claims that such a clause did not bind the parties, so as to avoid a transaction implying a verbal agreement for extra work, but that it was inserted in Government contracts merely to limit the powers of architects and superintendents. The judge said, "Courts cannot transmute a contract into a "statute of frauds, nor attach to the agreement of the parties the

Truckee Lodge  
vs.  
Wood,  
14 Nevada, 293.

Ford vs.  
U. S.,  
17 Ct. Cl. 60.

See, also,  
Rude vs.  
Mitchell,  
97 Mo. 365.



"irrevocable mandatory attributes of a statutory provision." . . .  
 "A provision in a written contract declaring that no claim for  
 "extra work shall be made unless it was required and agreed  
 "upon in writing is merely a condition, which may be waived  
 "by subsequent oral agreement." The Court said further,  
 "Where a public agent requests a departure from an express  
 "contract, and the change ordered is of such a nature that  
 "he may reasonably suppose that no additional expense  
 "will be caused thereby, the contractor is bound to speak, or  
 "he will be deemed to have consented to make the substitu-  
 "tion at the contract rate. But where the change is of such a  
 "nature that it must necessarily involve additional cost, no  
 "such notification is necessary, and the contractor will recover  
 "reasonable compensation."

It would, however, be dangerous to assume that the ordinary contract clause, declaring that no claims for variations shall be valid unless the work was ordered in writing, or unless the price has been previously agreed upon, can with impunity be disregarded. Scores of cases show that where the two parties have really intended that a formal order shall be given and accepted, in any manner that they choose to specify, for work to be considered as extra, and have expressed their intention in the form of a contract, the courts will give effect to their intention, no matter how anxious one of the parties may be, later, to escape from his agreement; and it is to be remembered that a written stipulation of this sort will be preferred to any verbal understanding or conversation that might modify its effect, and even to another, but less definite clause in the same contract, which would seem to contradict it. As an example of the strictness with which a written stipulation is enforced by courts, in disregard of verbal additions or explanations, a New York case is instructive. A written contract was made to deliver stone, "to be of the sizes and qualities such as the engineer in charge of the work shall approve." This contract was made with certain stone-cutters, and at the time of making the agreement the quarrymen,

*Trustees vs.*  
*Platt,*  
*5 Bradw. 567.*

*Condon vs.*  
*Jersey City,*  
*14 Vr. 452.*

*Thomas vs.*  
*Hunt,*  
*N. Y. App.*  
*Sept., 1867.*

who were the plaintiffs in the case, showed the defendants a large quantity of stone in the yard, and at the quarry, saying that this stone was a sample of the stone they would supply. The stone actually delivered, however, was inferior in quality to that shown, and cost much more to work, and the stone-cutters refused to pay for it, although it was approved by the engineer. The quarrymen sued for the price, and the stone-cutters, in their defence, endeavored to show that the stone furnished was not according to sample, and had cost more to work. Three successive courts, including the Court of Appeals, excluded this evidence, and gave judgment for the plaintiffs, the Court of Appeals saying that "The written contract between the parties must be regarded as containing the whole of their agreement upon the subject-matter thereof, and as merging therein all prior and contemporaneous conversations, stipulations and negotiations in relation thereto," and that parol evidence tending to show that the stone was to be like a certain sample, while the written contract said that it was to be such as the engineer approved, must be excluded.

In another case, where the written contract said that extra work was not to be paid for unless ordered in writing, and contained another clause, saying that "the engineer may direct alterations in, and additions to, the work," it was held that the latter clause was not to be construed as affecting the validity of the former one; and, where a contract provided that work should only be paid for as extra, if executed in accordance with a written order, a New York court even refused to admit evidence showing that the work had been done, unless the written order for it was at the same time produced.

Even where the contract contains a stipulation that variations or additions shall only be made in accordance with written orders or agreements, it seems to be the case, however, that in cases of emergency the architect or engineer may cause extra work to be done, to the extent necessary for the safety of the building, and that the owner can be required to pay for it.

*Thomas vs. Hunt,*  
N. Y. App.  
Sept., 1867.

*White vs. S. R. R. R.,*  
50 Cal. 417.

*Trustees vs. Platt,*  
5 Bradw. 567.

*Sutherland vs. Morris,*  
45 Hun. 239.

**Extra Work  
in Emergen-  
cies.**

*Board vs.  
Byrne,  
67 Ind. 21.*

A bridge was once built in Indiana, by written contract, under the supervision of a superintendent appointed by the County Commissioners. After the signing of the contract, the superintendent required the work to be done in a manner which made necessary more masonwork, and more filling, than was contemplated by the original contract. The Commissioners refused to pay for this additional work, on the ground that it was done voluntarily by the contractor, and that the county could only be bound by contract made with the Board. The contractor sued, and the case was carried to the Supreme Court. The Court, after examining the statute providing for the erection and repair of bridges, which said that "For the erection of any such bridge, the said Board shall appoint one or more discreet persons as superintendents thereof," and provided further, that such superintendents should receive proposals, and let contracts to the lowest responsible bidders, and require surety for the due performance of the contract, said, "It is thus seen that the superintendent has power to let contracts for the construction of bridges, and to superintend the work. We think that this makes the superintendent the agent of the county for the purpose of the construction of the bridge or bridges, and that he may bind the county by requiring work to be done beyond that contemplated by the contract. Such authority in the superintendent is necessary for the county, in order that the structure may turn out to be substantial and lasting; and it is proper, in order that the contractor employed to perform the extra work may have a remedy therefor. If it should be foreseen by the superintendent, after the letting of the contract, that the work performed or contemplated by it would be insufficient or defective, the county might be greatly the loser if he could not require such additional work as would make it substantial and permanent, and bind the county therefor."

*Seymour vs.  
Long Dock Co.,  
5 C. E. Gr. 397.*

So in New Jersey, where a contract had been made for building a tunnel, and extra work was found necessary, it was held that the contractor must be allowed payment for it.

Great caution is, however, necessary in any attempt to take advantage of this principle. As we have already seen, the courts hold that an architect has no authority to order changes or additions, unless the contract expressly gives him that authority, and an order given by him, without such authority, for work necessary in emergency to prevent injury to the building, if allowed at all, would probably be so on the ground that an architect is the agent of the owner for seeing that his building is carried out properly, and according to his wishes, and that, in this capacity, he is authorized to take such steps as may be necessary, in emergency, to save his employer from loss, whether the contract expressly gives him such authority or not.

In practice, it very frequently happens that, notwithstanding any stipulation in the contract that orders for variations which either increase or diminish the cost of the work shall be valid only if given in writing, the owner, as his building assumes shape, or his intentions with regard to it undergo change, orders various alterations verbally, without waiting for the more tedious process of writing out the order, or agreeing upon a price for the change, and is honest enough to pay for the work so ordered, without endeavoring to escape liability on the ground that the orders were not given as provided in the contract. Even where no verbal orders have been given, an order may be implied from the conduct of the owner, and orders of this sort are much more likely to be inferred, if he has already waived the contract stipulations in some other way. Such looseness in dealing with a contract is objectionable, as a waiver of the written agreement in one case opens the door for claims on the part of the contractor to be paid for following all sorts of innocent suggestions from the owner; but, if the parties, after abandoning their own agreement, fall into dispute, the courts will deal fairly between them. The principle governing such cases is well stated in a decision of the United States Circuit Court, which held that "Extra work done on houses built by contract in writing cannot be recovered for, unless

Verbal Orders for Extras.

Belt vs.  
Cook's, etc.,  
3 Cranch, 666.

*Belt vs.*  
*Cook's, etc.,*  
3 Cranch, 366.

there was a separate contract between the parties that such extra work should be done by the builder, and paid for by the owner, or unless the owner, while the houses were building, requested the builder to do the extra work, knowing that it was not comprehended in the written contract, and that the cost of the houses would be thereby increased. The mere circumstance of the owner's knowing that the extra work was doing, and not objecting to it, does not raise a contract on his part to pay for it; but is evidence which may be given to the jury, tending to prove that there was an agreement that the extra work should be paid for by the owner."

It is to be observed, moreover, that where the written contract requires orders in writing for variations, if the owner chooses at one time to give verbal orders for extra work, he cannot afterwards insist that subsequent verbal orders are invalid. Although verbal orders are sometimes hurriedly given, as occasion demands, and as soon as practicable afterwards ratified by a written order, so as to bring them within the strict intention of the contract, without, probably, exposing the owner to the presumption of having intended to waive the contract stipulation, it would obviously be unjust to allow an owner to give verbal orders for various things, and then claim that some of these orders were valid, while others were invalid, as conflicting with the condition of the contract. This point has been covered by a New York decision, which says, "A written contract may be waived, either in whole or part, by parol, and after it has been thus waived by one of the parties, neither he nor any one acting under him can reinstate it."

*Wood vs.*  
*Perry,*  
1 Barb. 114.

**Waiver by  
Implication.**

*Bryant vs.*  
*Stillwell,*  
24 Penn. St. 314.

The waiver of a condition of a written contract by implication is a much more difficult matter. To say that an owner stood by and saw certain work going on which was not in accordance with the contract, by no means proves that he ought to be compelled to accept it, or to pay for it. Owners are not usually experts in building matters, and it would be unreasonable to expect them to understand the full significance of what they may see. It has been held in Pennsylvania that

"It is no excuse for non-performance that the employer looked on while the work was in progress, unless there be evidence from which his assent may be implied;" and this appears to be the rule followed by other courts. What the nature of the evidence is, from which the owner's assent to the change may be implied, is indicated by a few decisions. Where a contract required that a cold-air register should be put in at the base of a building, to supply a heating furnace, it was proved that the owner occupied the house, and used the furnace, for three months, without objecting to the absence of the cold-air register; and it was held that this amounted to a waiver of the contract stipulations in regard to the omission. So in a case where a parol contract had been made for building. The owners' engineer, in the presence of one of the owners, staked out the outer walls. There was a partition wall through the middle of the building, which the contractor staked out. When the building had been carried to the top of the first story, the partition wall was found to be three inches out of its proper position. The owners did not demand that the wall should be taken down and rebuilt in its proper position, nor did they object to having the work go on; on the contrary, they changed the lengths of the joists, put on the floors, and built the iron front, all in accordance with the changed position of the partition wall. In a suit by the builder for his pay, it was claimed that he was not entitled to recover anything, or, if anything, only the contract price, less what would be the cost of taking down and rebuilding the partition wall, and making good all damage occasioned by so doing. The court held, however, that if the owners were entitled to any damages, it would be only for the difference between the value of the building as actually constructed, and what it would have been worth if it had been built according to the plan. No evidence was produced to show that the building was worth any less by reason of the misplacement of the partition wall, and judgment was given in favor of the builder.

If, however, the builder, without express direction, or

*Bristol vs.*  
*Tracy,*  
21 Barb. 236.

*Schaefer vs.*  
*Gilder,*  
3 Colorado, 15.

*See, also,*  
*Pike vs.*  
*Nash,*  
1 Keyes, 336.

*Dermott vs.*  
*Jones,*  
2 Wall. 9.

*Smith vs.*  
*Brady,*  
17 N. Y. 73.

*Everroad vs.*  
*Schwartzkopf,*  
123 Ind. 35.

**Responsibility for Variations.****Clark vs.  
Pope,  
70 Ill. 128.**

consent of the owner, makes variations from the contract, he becomes liable for the strength and safety of the building, so far as it may be affected by such changes, even though the owner may not have objected to them. One Pope contracted to build a wooden church, according to certain plans and specifications, which were made part of the contract. The basement was done, and occupied, and the upper story nearly done, when a gale blew down the upper part. No complaint was made of the construction before the building was blown down, but, subsequently, when the contractor demanded his pay for the building, the owners claimed that it was not constructed according to the contract. The specifications were silent on the point, but the architects claimed that the plans showed the studs of the upper story resting on the lower ones, and the first-floor beams resting on a ribbon, in such a way that the beams covered the junction of the two sets of studs, and were spiked to both. Instead of this, Pope had put a plate on the lower studs, and the upper studs stood on the plate. The witnesses differed as to the relative strength of the two constructions, and as to which the plans really showed. The judge in the court below instructed the jury that "If the contractors departed slightly from the plans, specifications and drawings, yet, if such departure did not diminish the strength of the building, nor contribute to its being blown down, such departure does not deprive them of their right to recover in this action, if the contract appears, by the evidence, to have been otherwise complied with." The Supreme Court of Illinois, however, reversed the decision, saying, "This position is untenable. "The contractors had no right to depart from the working-plans made part of the contract. If they did so, it was at their peril, and they would become guarantors as to the strength and safety of the structure." . . . "The drawings were made part of the agreement. The contractors could only discharge themselves from liability by constructing the building in accordance therewith, unless a deviation was mutually agreed upon."

Besides the question of whether variations have been made as the contract provides, or whether the provisions of the contract respecting them have been mutually waived, there is often a difference of opinion as to what shall be the price to be paid for them. Contractors generally suppose that all extra work can be charged for at day-work prices, but this is by no means always so. Contracts often provide expressly that the price for extra work shall be estimated in proportion to the contract price for the entire work, and where the extra work is likely to be of the same sort as that provided for in the contract, a schedule of the different portions of the contract work, with their respective quantities, and the amount allowed for them in making up the contract price, is often appended to the contract, and a stipulation agreed to by both parties that the same schedule shall be the basis of payments for extra work. Even where such a schedule is not made, but the contract simply provides that extras shall be estimated in proportion to the contract price for the entire work, it has been held that nothing but the contract estimates can be used in making up the prices for extra work, and that evidence of the reasonable value of such extra work is not admissible.

Where the variations from the contract consist of deductions instead of additions, there is some uncertainty as to the manner in which they will be treated by the courts. If the contract expressly provides that deductions may be made, and an allowance made for them, either at the contract price, or at a reasonable price, there is no doubt that the stipulation will be enforced; but where there has been no agreement on the subject, there seems to be a tendency to allow the contractor something for the work which he had agreed to do, and was ready to do, but which was omitted at the request of the other party, and for his benefit. The contract for the storage reservoir of the Brooklyn Water-Works provided that the work should be done under the direction of the engineer, who had extensive discretion in making changes. Piles, which were intended to have been driven to a depth of twenty-four feet,

**Price for  
Extra Work.**

**Eigemann vs.  
Board,  
82 Ind. 412.**

**Deductions  
from Con-  
tract.**

**Kingsley vs.  
Brooklyn,  
78 N. Y. 200.**



*Kingsley vs.*  
*Brooklyn,*  
*78 N. Y. 200.*

and had been so specified in the contract, were, by the engineer's order, driven only to a depth of sixteen feet. It was not claimed that any detriment to the work resulted from this change, but the city demanded that the contractors should make an allowance from the contract price, proportional to the saving which had resulted to them from the change. The New York Court of Appeals, however, decided that, "no deduction could lawfully be made," and that the contractors were entitled to their pay. The Court said, "The defendant "had a right to demand the very work specified, and if it "accepted anything less as sufficient for the purpose named, has "no right to insist that a rebatement should be made for that "reason."

In practice, as nearly all written contracts provide for the case of the omission of work agreed upon, the contract stipulations would settle any question of the kind, but, where building operations are being carried on under a verbal contract, or under a written contract which does not cover this point, it would be prudent for the owner, or for the architect in his behalf, to see that an agreement is arrived at as to the allowance to be made from the contract price, before ordering any omissions from the work contracted for.

*Trustees vs.*  
*Platt,*  
*5 Bradw. 587.*

In regard to omissions of work required by the contract, where the contract provides that such omissions may be made, it is to be remembered that where a contractor agrees upon a price for leaving out any of the work, he is presumed to include in his proposition the cost of doing any work not in the original contract, that may be rendered necessary by the omission. A contract was once made for a brick building, in which it was specified that the work was to be tuck-pointed. The owners decided to leave out the tuck-pointing for the sake of economy, and an agreement was made with the contractor for a deduction from the contract price in consideration of the omission. After the building was done, the contractor presented a bill for striking the joints of the brickwork, as an extra. The Court, when suit was brought on this bill, held

that "When the agreed deduction was made for omission of "tuck-pointing, it is to be presumed that all necessary estimates "were made, so that the work, when finished without the tuck-pointing, should conform to the contract, which required first-class workmanship in all respects." It was therefore decided that the contractor's claim was invalid, and particularly so, as the contractor went on with the work, without requiring this extra item to be inserted in the contract, or calling for decision from the superintendent in regard to it.

It is a common notion among builders that any variation from a written contract invalidates it, so that the contractor thereupon becomes entitled to claim payment for all that he has done at day-work rates, without reference to the contract price. This notion is quite unfounded, as the courts will always enforce the provisions of a contract, so long as any can be ascertained which have not been abrogated by consent of the parties; but it is possible to confuse a contract by alterations to such an extent as to render it impossible to determine what the original agreement was, or how it can be applied to the work actually done; and in such cases a reasonable valuation of the work done and materials delivered constitutes the only means by which the builder can be fairly compensated. Whether the changes and variations from the contract have been such as to amount to an abrogation of the original contract, and the substitution of something else, is, according to the Virginia courts, a matter for the jury to decide.

How the parties will be treated in case the contract is thus abrogated may be inferred from a decision which says that "Where the original plans on which the contract was founded have been by mutual consent so substantially and materially departed from as to amount to a constructive abandonment of its terms and specifications, the case should be regarded as one of general employment, with an implied obligation by the owner to pay what the work and materials are reasonably worth." In this case, although the contract referred to some

*Trustees vs.  
Platt,  
5 Bradw. 567.*

*Bozarth vs.  
Dudley,  
15 Vr. 304.*

*Haynes vs.  
2d Bapt. Ch.  
88 Mo. 285.*

*Menne vs.  
Neumeister,  
26 Mo. App. 300.*

*James River  
Co. vs.  
Adams,  
17 Gratt. 427.*

*Bozarth vs.  
Dudley,  
15 Vr. 304.*

*Smith vs.  
Coe,  
2 Hilt. 365.*

"plans," there were none, nor were there sufficient specifications to ascertain whether the building was to be of brick or stone, and the work was practically done under the defendant's directions.

*McMaster vs.  
State,  
106 N. Y. 542.*

In a New York case, the matter was treated differently. The State had contracted for the stone-cutting work on a group of buildings, which were, according to the specifications, to be faced with stone. The contract reserved to the State the right to make any change it deemed proper in the plans and specifications. Later, the State postponed indefinitely the construction of five of the buildings, and changed the others, so as to have them faced with brick, instead of stone. The contractors for the stonework cut the trimmings needed for the buildings in their new form, but sued the State for damages for breach of the original contract. The Court of Appeals held that the provision for changes in the contract did not authorize the substitution of brick instead of stone in the construction of the buildings, and that the contractors could recover damages for the breach of the contract by reason of the change. It was argued in defence that the act of the contractors in cutting the stone required for the trimmings of the buildings as ultimately constructed amounted to a waiver of any claim for damages for the breach of the contract in changing the facings from stone to brick; but the Court held that it was not such waiver.

**The Contractor's  
Position  
Where Work  
is Abandoned.**

Another claim for damages was made by the contractors, on account of the abandonment, or postponement, of the construction of the other five buildings, for which they had contracted to furnish stone. The contract did not say anything about allowing either of the parties to postpone performance indefinitely; on the contrary, it required the contractors to "commence the work immediately and prosecute the same diligently to its completion." The Court held that the State was not authorized to avert and abandon performance for an indefinite period, but was bound to go on with the construction without unnecessary delay, until all the buildings were completed, and

that the abandonment of the work as to five buildings entitled the contractors to damages. It was argued by the counsel for the State that the contractors ought to have given notice of their willingness to go on with the work under their contract, in order to hold the State for the breach; but the Court held that no offer or tender of performance was necessary.

It will be seen that the claim in this case was for damages for the breach of the contract, while in the former one it was simply for payment of a reasonable price for the work actually done, without regard to the original contract, which the petitioner wished to have considered as abandoned by the mutual consent of both parties. It would in many cases be open to the petitioner to take either position, and it would be for his counsel to determine which would be most advantageous, but it has been held that he cannot take both; that is, he cannot claim to be paid by the day for work he has done under a contract which he was prevented from completing, or which was so obscured by changes as to be incapable of being traced, and at the same time recover damages for the breach of the contract.

In regard to the abrogation of contracts by changes in them, it seems to be the rule that where the original contract can be traced, or any stipulations belonging to it which could reasonably apply to the work as altered, the portions still applicable will be enforced, and here also the circumstance of the sealing of the contract seems to be of some importance. Under a building contract of the usual sort, sealed, which provided that changes might be made, the owner omitted certain things, and added others, which were agreed to be equivalent to those omitted. The owner said that if the changes were made, he would "thereupon" make payment of the contract price. When the work was done, however, he fell back on the stipulations of the contract as to payments. The contractor sued, claiming that the changes which had been made amounted to an abandonment of the original contract, so that payment for the work would be due when the work was finished, as in the

*Phillippi vs.  
McLean,*  
5 Mo. App. 587.

*Tinker vs.  
Geraghty,*  
1 E. D. Smith,  
687.

*Tinker vs.  
Geraghty,  
1 E. D. Smith,  
687.*

case of ordinary day-work ; and that the owner's promise, if the changes were made, "thereupon" to make payment, was an additional express agreement on his part to pay on completion. The Court, however, held that the changes from the contract, made by mutual consent, had no effect upon the sealed covenant by which the terms and times of payment were fixed ; and, as to the verbal promise of the owner, the Court said that a provision of this description in a sealed contract could not be altered by parol, unless upon sufficient consideration.

In the same way, in Illinois, it has been held that "where the terms of a contract have been departed from, by consent of the parties, they will still regulate the rate of compensation, so far as they can be traced."

*Tew vs.  
Newbold,  
1 C. & E. 280.*

*Alger vs.  
Vanderpoel,  
34 J. & S. 161.*

Whether variations from the contract as to the work done abrogate the provisions relating to the time of completion, or the procuring of the architect's certificate before payment, seems to depend on the circumstances, and the character of the deviations. It has been held that orders for extra work do not extend the time of completion, if the architect, under the contract, has power to extend the time on account of extra work, and does not do so ; and, in another case, where orders for variations were permitted under the contract, the value to be added to or deducted from the contract price, it was held that work and materials so provided, although not called for by the contract, would be deemed as done thereunder, and no recovery could be had therefor without full performance of the contract.

*Van Buskirk  
vs.  
Stow,  
42 Barb. 9.*

*Bimbauer vs.  
Gleason,  
48 Hun. 614.*

On the other hand, in a case, where, as it seems, the contract did not provide for the point in question, and where extra work was ordered by the owner, it was held that the time of completion must be considered as having been extended by the parties, to enable the work agreed upon to be completed. Here it appeared that the work included in the original contract would have been completed within the time stipulated in the contract ; and, in a somewhat similar case,

where considerable variations were made from the contract, without the owner's orders, but were subsequently adopted by him, it was held that the production of the architect's certificate, although required by the original contract, was not necessary for payment.

*Adams vs.*  
*Cosby,*  
48 Ind. 153.

Where, in the absence of any stipulation in the contract as extension of time for extra work, the limit of time is held to be extended by reason of the ordering of variations, the implied stipulation thereafter is that the work shall be completed within a reasonable time.

*Green vs.*  
*Haines,*  
1 Hilt. 254.

## CHAPTER XXIV.

### THE ABANDONMENT OF CONTRACTS.

**A** PART from the modifications which may be made, either by agreement or implication, in carrying out contracts, they may be wholly abandoned by either party, either directly or virtually, and it is important to know the rights of both parties in such cases. It is, as will be remembered, the general rule of law that if two parties make an agreement, by which one is, for a consideration, to do something for the other, and one of them without good cause refuses or neglects to carry out his part of the agreement, the other, if he is still willing and able to carry out his part, is entitled to recover from the other the contract price agreed upon, less the actual expense that he would have incurred in doing what he had promised; or, in other words, the profit that he would, with reasonable probability, have made out of the transaction. This rule was applied in the case of *McMaster vs. State of New York*, 108 N. Y. 542, quoted at some length on Page 292, but, in most building cases, the claims of the parties are so much complicated with alleged delinquency on both sides that it is lost sight of.

*McMaster vs.  
State of N. Y.,  
108 N. Y. 542.*

The abandonment of building contracts may be brought about in at least four ways. The owner may retreat from his bargain, as in the case just cited, or may not fulfil his part of the contract; or the builder may refuse or neglect to do what he has agreed; or the two parties may agree with each other, either expressly, or by implication, that the whole or a

part of the work shall be given up; or the law, or some other irresistible power, may interpose to prevent the agreement from being carried out. In all these cases, as will be seen, the law will maintain the sacredness of the contract, and will try to enforce so much of it as still remains unaffected by the conduct or subsequent agreements of the parties.

Thus, if a builder, who has partly completed his contract, so that he has conferred upon the other party substantial benefit, which the other party has accepted and taken the advantage of, then abandons the work, without the fault or consent of the other party, he will not be allowed to claim the reasonable value of his work and materials, irrespective of the contract price, as would be the case under some other conditions, but can, under the most favorable circumstances, recover only the contract price, less what it would cost to finish the work he had agreed to do, and deducting also whatever damage the owner may have suffered from his abandonment of the contract.

If the owner is in default in carrying out his part of the agreement, the rights of the builder are greatly enlarged. It is then generally held that he is entitled either to treat the contract as still existing, and claim damages from the owner for the breach of it, as well as compensation at the contract rate for what he has done, or may treat the contract as having been abandoned, or "rescinded," and demand payment for his work and materials at their reasonable value; and even where there has been no intentional default, but so many changes have been made from the original plans and specifications as to make it impossible to trace the contract, and say to what part of the work it shall be applied, it has been held that recovery can be had on *quantum meruit*, that is, at the reasonable value of the work and materials furnished. It seems to be the rule that the claim cannot be made in both ways, so that the petitioner, or his counsel for him, must choose at the outset which course to take, and it will depend on circumstances which will be the more advantageous. In

Ibers vs.  
O'Donnell,  
26 Mo. App. 120.

Gregg vs.  
Dunn,  
38 Mo. App. 283.

Bozarth vs.  
Dudley,  
15 Vr. 304.

Robson vs.  
Godfrey,  
Holt. 236.

Lincoln vs.  
Schwartz,  
70 Ill. 134.

Wheeden vs.  
Fiske,  
50 N. H. 126.

Keys vs.  
Stone,  
5 Mass. 391.

Tuttle vs.  
Mayo,  
7 Johns. 132.

Leminsdate vs.  
Lampton,  
10 Johns. 36.

Clark vs.  
Mayor,  
4 N. Y. 338.

Jones vs.  
Judd,  
4 N. Y. 411.



Austin vs.  
Keating,  
21 Mo. App. 30.

Williams vs.  
Porter,  
51 Mo. 441.

Philippe vs.  
McLean,  
5 Mo. App. 587.

Ahern vs.  
Boyer,  
19 Mo. App. 552.

Kearney vs.  
Doyle,  
22 Mich. 234.

Ehrlich vs.  
Ætna,  
15 Mo. App. 552,  
88 Mo. 249.

McCullough vs.  
Baker,  
47 Mo. 401.

Clark vs.  
Mayor,  
4 N. Y. 338.

Wilson vs.  
Bauman,  
80 Ill. 493.

Selby vs.  
Hutchinson,  
4 Gilm. 319.

Webster vs.  
Enfield,  
5 Gilm. 300.

some cases, even where the suit is brought on *quantum meruit*, the judge may instruct the jury that the reasonable value of the work done, and materials delivered, must be ascertained by applying to what has been done the contract rate for the whole work, instead of allowing for them the ordinary market prices. The practice in this respect, however, seems to vary in different States. The Supreme Court of Michigan said, "It would be unjust to confine a party to the contract price when, by the fault of the other party, who has practically repudiated it, he is deprived of the opportunity of finishing it." Here the suit was brought on *quantum meruit*. In the same way, it has been held in Missouri that "in a suit on *quantum meruit* and *quantum valebant*, a contractor is not restricted to a pro rata part of the contract price, if he has been prevented from completing the contract by the other party." The idea in this ruling is, perhaps, that in an action on the contract, where one party had been prevented by the other from completing what he had agreed to do, the one so prevented would be entitled to recover, not only payment for what he had done, but damages for the breach of the contract in addition; and it would hardly be fair, simply on account of the action having been brought in a different form, to restrict his recovery to the contract rate for what had been done, without any equivalent for the additional amount that would be awarded him as damages in a suit in the other form. In fact, this is the way in which the principle was expressed by the New York Court of Appeals, which held that "Where performance is prevented by one party to a contract, who terminates the agreement against the will of the other party, the latter may either sue for breach of contract, and recover as damages the profits he would have made if allowed to complete the work; or he may waive the contract, and bring his action on the common count for work and labor generally, and recover what the work done is actually worth; but in this case he cannot recover for profits on the unexecuted part of the work." The Michigan courts, however, carry out their

principle logically, even where it does not work to the advantage of the contractor. In *Allen vs. McKibben*, 5 Mich. 449, it was held that, in a suit on *quantum meruit*, a contractor could not recover the contract price, if his work was not reasonably worth it.

It should be noticed, in these cases, that there is an important distinction between mere failure of the owner to do all that he had agreed to, and such conduct as prevents the other party from carrying out his part of the contract. The Illinois Supreme Court says, "Where materials are furnished, and work done, under a special contract, the price therefor must be governed by its stipulations," and this rule has been strictly adhered to, with one apparent exception, in the case of *Cook County vs. Harms*, 108 Ill. 151, in which, however, the changes and extra work were so material that the Court held that the contract ceased to govern.

The Supreme Court of Missouri still further explains the matter by saying, "A mere breach of contract does not entitle the other party to stop work, and recover for unperformed work. He might stop work, and recover for what he had already done, but not for what remained to be done. To recover for that, he must have been prevented from going on by the unauthorized interference of the other party"; and it is added in one case, "The measure of damages, on the contract, in such cases is the contract price, less what it would cost to complete the work."

What is considered to be mere breach of contract, and what such conduct as amounts to preventing the other party from carrying out his part, may be indicated by a few examples.

In Indiana case, the owner did not pay the instalments of money as the work went on, and the builder abandoned the contract, and sued for damages, alleging that he was prevented from doing what he had agreed by the failure of the owner to make payments on account. The Court said that, if the owner had really prevented performance of the contract, the builder would be entitled to recover, as damages, the profit

*Butts vs. Huntley*,  
1 Scam. 410.

*Herrington vs. Hubbard*,  
1 Scam. 569.

*Dubois vs. Canal Co.*  
4 Wend. 290.

*Campbell vs. Gates*,  
10 Penn. St. 483.

*Folliott vs. Hunt*,  
21 Ill. 654.

*Evans vs. Ch. & R. I. R. R.*  
26 Ill. 189.

*Holmes vs. Stummel*,  
24 Ill. 390.

*Fitzgerald vs. Hayward*,  
50 Mo. 516.

*Park vs. Kitchen*,  
1 Mo. App. 357.

*Kelly vs. Rowane*,  
33 Mo. App. 440.

*Fairfield vs. Jeffreys*,  
68 Ind. 573.

*See, also, Griffin vs. Culver*,  
16 N. Y. 4:9.

*Cassidy vs. Lefevre*,  
45 N. Y. 562.

*Cox vs.  
McLaughlin,*  
54 Cal. 688.

*Chapman vs.  
Irvine.*  
24 Mich. 375.

*Borgen vs.  
N. Orleans,*  
25 La. 522.

*Schwartz vs.  
Saunders,*  
46 Ill. 18.

*Hill vs.  
Hovey,*  
26 Vt. 169.

*Devlin vs.  
Mayor.*  
63 N. Y. 3.

*Dunn vs.  
Johnson,*  
23 Ind. 54.

that he would have made if he had been allowed to complete the work; but it held that a mere failure to pay money due on the contract before the completion of the work did not constitute such prevention.

On both these points somewhat different rulings have been made in other States. In Louisiana, it has been held that prospective profits, as being contingent, cannot be recovered as damages in cases of this nature; and in Illinois, where the owner had failed to pay the instalments required by the contract, of eighty-five per cent of the value of the work done, it was held that the builder was justified in abandoning the contract, and could recover under a mechanics' lien for his work. The Court said, in this case, "Why the appellee should not be paid for the work he had done, and which had been accepted, and have a lien therefor, we cannot perceive." . . . "A great hardship would be worked if builders should be deprived of means of supplying materials, by reason of defaults in payments, on which they must be supposed to have relied when they entered into the contract." In this case, the contract was for carpenter work only. While the work was going on, a brick wall was blown down. The carpenter could not go on with his work without the wall, and the owner refused to build it. The Court held that on this ground also the builder was justified in abandoning the contract, and was entitled to enforce a lien for the work done, as the owner, by refusing to rebuild the wall, prevented the other party from completing the contract. The question of whether damages should be allowed the builder for the breach of the contract by the other party does not seem to have been brought up in this case.

*Bonnet vs.  
Glatfeldt,*  
120 Ill. 166.

In another case, a contractor agreed to take down some defective walls of a building which had been burned, and rebuild, according to plans and specifications prepared by an architect, and the architect was appointed superintendent, with full power to inspect, accept or reject any work done, or materials to be used, whether worked or otherwise, when not

in accordance with the plans, specifications and detail drawings; and it was provided that his decision on that matter, and on all other matters relating to the building, etc., should be binding and conclusive upon both parties. The architect, before the contract was made, examined the building, and determined what part of the walls it was necessary to take down. The contractor took them down, in accordance with the architect's directions. Before the work was done, the owner got other men, pulled down some of the contractor's new work, and more of the old work, and completed it himself. It was held that the contractor was justified in following the architect's directions; that the contract was rescinded, and that he could recover. The court below allowed him to recover on *quantum meruit*, or by reasonable value, and no objection was made by the other side; so the Supreme Court did not undertake to decide whether market price or contract price should govern in the amount to be recovered.

Bonnet vs.  
Glattfeldt,  
120 Ill. 168.

In Illinois, a firm contracted to make and put up in a building certain ironwork. When the ironwork was ready, the building was not in condition to receive it. Finally, notice was given to the iron contractors, on Saturday afternoon, that the building was ready for the ironwork to be put up. The Sunday night following, the building was burned, the ironwork not having yet been put up. The iron contractors sent the owners a bill for the ironwork, not including putting up. In a suit, subsequently, for the amount of the bill, it was held that they were entitled to recover.

Rawson vs.  
Clark,  
70 Ill. 656.

In cases of this kind, where the contractor is put to loss by the failure of the owner to have the building ready at the agreed time, the builder is not obliged to abandon the contract, but may go on, when he is at last afforded an opportunity, and complete his work, and recover, in addition to the contract price, damages for the injury caused him by the delay, his subsequent performance of his contract not being regarded as a waiver of his claim for damages. A man once contracted to do the carpenter work on a building in New York, the work

Allamon vs.  
Mayor,  
43 Barb. 33.

to be done "without delay." He hired workmen at once, supposing that they would be immediately required, and kept them, doing nothing, for some time, expecting to be called upon to carry out his contract. When he was finally called upon to do the work, some time afterwards, it was winter, the days were short, so that the men could not do so much work in a day, and the prices of materials had risen. Nevertheless, he completed his contract, and subsequently sued for compensation for the loss he had suffered, in addition to the contract price. It was held that he had a right of action, on account of the failure of his employer to have the building in readiness for him to perform his contract, whereby he incurred loss, and did not waive that right by performing the work when the building was made ready.

*Mansfield vs.  
N. Y. C. R. R.,  
102 N. Y. 206.*

In another New York case, the plaintiffs contracted to build an elevator, commencing within five days after notice that the foundations were ready, and completing within five months thereafter. Notice was given that the foundations were ready, and the contractors inspected them, and protested against using them; but, at the request of the defendant's engineer, and on the assurance that they should not thereby waive any rights secured by the contract, they commenced the work. The foundations proved not to be in proper condition for building upon, and the contractors were put to expense and loss in consequence. In an action for damages on this account, it was held that it was an indispensable condition to the performance of the work that foundations should be prepared, and the contract implied that they should be furnished in proper condition. The defendants argued that the notice given to the contractors was not a guarantee, but simply an expression of the engineer's opinion; but the Court held that it was a certificate of an actually existing fact. As to the claim that the contractors, by commencing work on the foundations after they had objected to them, waived their claim to damages on account of their insufficiency, the Court held that it was no waiver, and that the contractors had the option, either to

refuse to commence the work, or to commence and prosecute it, relying on the contract to recover such damages as the breach caused them.

Two other New York cases raise additional points. In one, suit was brought by the contractor for the heating work in the LaFarge House, for payment for his work. It was proved that the contract had been nearly completed when the building was destroyed by fire. It was also proved that the heating contract required the work to be done at a date previous to the fire, so that the contractors had not fulfilled their agreement. The lower courts gave judgment for the defendant, but the Court of Appeals reversed the judgment saying that, "Where the owner of a building contracts for labor to be performed on it, he is under an implied obligation to have the building ready, and in a condition to receive the labor contracted for." In regard to the fact that the plaintiff had not kept his agreement in regard to the time of completion, the Court held that the defendant acquiesced in the delay, and the plaintiff was not thereby deprived of his right of action.

*Niblo vs.  
Binse,  
N. Y. Appeals,  
3 Abbott, 375.*

In the other case, where the employer prevented performance, it was sought to prove that the contractor was bankrupt, and could not have gone on with the work if the owner had given him an opportunity; but the Court held that in such a case it was unnecessary to prove readiness and ability on the part of the contractor to perform his agreement, in order to recover against an employer who had prevented him from trying to do so; and that evidence of the insolvency of the contractor was immaterial.

*Howell vs.  
Gould,  
N. Y. App.,  
2 Abb. 418.*

In the first of these cases, it is important to observe that the heating contractor had no control or charge of the building, so that he could not be held responsible for the fire or its consequences. The Court of Appeals, in discussing this point, cited a case where some builders had contracted to build a school-house. The house was all done, except a little painting, and the hanging of the blinds, when it was burned. The school authorities sued the builders, and recovered all the money that

*Tompkins vs.  
Dudley,  
25 N. Y. 272.*

had been paid on account of the contract, besides damages for non-performance. The Court explained that in this case the contractors were in charge of the building, so that the decision was not inconsistent with their opinion in cases where the owner was the party in charge.

**Farnham vs.  
Kross,  
2 Hall, 167.**

If the employer, as sometimes happens, by directing changes in the manner of working, prevents performance of the contract work in the manner agreed, while the contractor is willing and ready to carry out his agreement, it may be held that this is equivalent to performance. On the other hand, if the builder makes an agreement to carry out the work according to certain plans and specifications, he will not be released from his contract by the subsequent discovery that the execution of the plans is difficult or impracticable. It is his duty to ascertain whether the plans can be carried out before he signs a contract to do it.

**Hooper vs.  
Webb,  
27 Minn. 466.**

If the performance of the work agreed upon should be prevented by the interference of the law, the contractor is released, and is entitled to payment for what he has done, and here, again, there may be a difference in the claim if the employer has been at fault in the matter. In a Mississippi case, a man, B, contracted to build a mill-dam for A. A knew, though B did not, that objection would be raised to the dam as a nuisance. B had the work partly finished, when he and A were enjoined from completing it. It was held, in a suit by B against A, that B was entitled to recover on *quantum meruit* for the work he had done.

**Whitfield vs.  
Zellnor,  
2 Cushman,  
(Miss.) 663.**

In this case, the court seems to have considered that the owner was at fault in having failed to disclose to the contractor the fact that he would probably be enjoined; for, in a New York case, where the completion of a contract was prevented by law, it was held that the contractor was only entitled to recover for the work actually done, at the contract prices. In another New York case, the question came up, whether the prohibition of the Superintendent of Buildings should be considered as an interference of the law, and it was decided that it must be so considered.

**Jones vs.  
Judd,  
4 N. Y. 412.**

**Heine vs.  
Meyer,  
61 N. Y. 171.**

The same rule is applied to cases where, instead of the performance of the contract having been prevented by the interference of the law, the contract itself has been void from the beginning, without fault on the part of the contractor. It will be recollected that a contract for work not to be performed within a year from the making of the agreement is, under the Statute of Frauds of most of our States, void unless in writing, and may be void under the statute for several other reasons; but it has repeatedly been held that a person may recover on *quantum meruit* for services rendered under a contract void, under the Statute of Frauds, because not in writing. Again, where a plaintiff, who sues for work and materials furnished under a building contract, is himself in default in the performance of the contract, he may still be entitled to recover on *quantum meruit*. This principle is sometimes held to apply to cases where a builder has failed to perform work substantially according to his contract, but the work done is of value to the other party, who accepts and uses it; but it will be remembered that all the courts are not in accord in this matter.

Where either party finds that the contract cannot be exactly performed, he must, if he wishes to declare it rescinded, exercise his right to do so when the occasion for it accrues, or he may be held to have waived his right. Thus, if an owner, by directing radical changes, delaying his decision on questions referred to him, or in some other way, prevents the builder from carrying out the strict letter of the contract, the latter must, at the time, give notice that he will, in consequence of the owner's action, no longer be bound by the contract, or, if he prefers, by certain stipulations in it, such as that for the time of completion, or any others which the owner's conduct has made it difficult to comply with. If the builder neglects to do this, and goes on without objection, he cannot afterwards benefit by a claim that the contract was broken. In the same way, if the owner, finding that his building is not completed at the agreed time, or that the builder has committed other

Mills vs.  
Joiner,  
20 Fla. 479.

Cohen vs.  
Stein,  
61 Wis. 508.

Tucker vs.  
Grover,  
60 Wis. 240.

Fleischmann  
vs.  
Miller,  
38 Mo. App. 177.

Gregg vs.  
Dunn,  
38 Mo. App. 283.

Gove vs.  
Island City,  
24 Pa. 521.

Lapham vs.  
Osborne,  
20 Nev. 168.

Patten vs.  
Hicks,  
43 Cal. 511.



Gallagher vs.  
Nichols,  
60 N. Y. 433.

Morrison vs.  
Lovejoy,  
6 Minn. 319.

Taylor vs.  
Mayor,  
83 N. Y. 623.

Siebert vs.  
Leonard,  
17 Minn. 434.

faults which, under the contract, entitle the owner to rescind it, suffers the builder to go on, without expressing his disapproval, or giving notice that he intends to cancel the contract, he waives the right to do so; and although he can recover damages, as the contract provides, for the injury he has suffered, he cannot subsequently claim that the contract was forfeited. An owner once, having availed himself of a clause in the contract, allowing him to complete the work, after the contractor's default, and deduct the cost of completion from the amount to be paid to the builder under the contract, defended himself, in an action brought subsequently on the contract, by claiming that what he had done was under the contract. Subsequently, he, or his counsel for him, claimed that the contract was forfeited by the builder's action; but it was held that he could not, having once chosen to regard the contract as continuing, afterwards claim that it was forfeited.

It is well for owners, as well as contractors, to remember that a contract may be rescinded by giving such orders, even where the contract permits orders to be given for variations, that the building falls, or is otherwise seriously injured. A contractor once ordered a sub-contractor to build certain walls in such a way as to be unsafe. The sub-contractor told him that he thought they would be unsafe, but the principal contractor insisted that they should be built according to his directions. They fell, and the contractor refused to pay for them. The sub-contractor, who would hardly have been able to recover under his contract, which, of course, required him to deliver walls, not ruins, elected to treat the contract as rescinded by the orders which had been given him, and sued on *quantum meruit* for the value of the materials and labor that he had furnished. The defendant claimed that the sub-contractor, by his folly in complying with directions that he knew to be improper, rendered himself jointly responsible with the principal contractor for the result of doing so, under the doctrine of contributory negligence; but it was held that the impropriety in the directions, against which the sub-contractor

remonstrated, was not a matter of knowledge, but of opinion, and that the principal contractor, by insisting on their being followed, in spite of the remonstrance, assumed the risk, and that the sub-contractor could recover.

This case should be distinguished from those where a builder contracts to carry out plans and specifications which afterwards prove to be impracticable. As has been before shown, a builder is presumed to understand plans and specifications, and, if he finds any obscurity in them, he has opportunity for asking explanations from the architect before he agrees to build in accordance with them, so that he will not afterwards be excused from carrying out what he has agreed to do on the ground that he has found it to be impracticable or unsafe.

Where the contract has been broken, or abandoned, the position of the architect is somewhat changed, although in this, as in other points, the decisions of the courts differ. In several States, it has been held that, if the owner prevents performance of the contract, the architect's certificate of completion becomes unnecessary. In a similar way, it has been held in Missouri that where suit is brought by the builder for payment for work done, under *quantum meruit*, the necessity for producing the certificate of the architect, as to the completion of the work, or its satisfactory quality, no longer exists; and, although the architect may testify in regard to these matters, his testimony will count for no more than that of any other expert.

Even in a suit on *quantum meruit*, however, the certificate was held to be necessary, where the architects had pointed out certain defects, which the contractors claimed to have remedied.

Where the contract has not been entirely rescinded or abandoned, it has been held that, where considerable variations had been made from the contract work, but the building had been occupied, the architect's certificate was not needed to recover payment; and a general decision has been given in California, to the effect that "Assumpsit will lie to recover a

Siebert vs.  
Leonard,  
17 Minn. 434.

Hall vs.  
Bennett,  
48 Sup. Ct.  
N. Y. 302.

Dinsmore vs.  
Livingston,  
60 Mo. 241.

Yeats vs.  
Ballentine,  
56 Mo. 530.

Rude vs.  
Mitchell,  
97 Mo. 365.

Hanley vs.  
Walker,  
79 Mich. 607.

Adams vs.  
Cosby,  
48 Ind. 153.

*Castagnino vs.  
Balletta,  
21 Cal. 1097.*  
*O'Connors vs.  
Hurley,  
147 Mass. 146.*

balance due on a special contract to erect a building, and it is not necessary to allege the performance of all the conditions to be performed before payment is due." The production of the architect's certificate would probably, on occasion, be regarded as one of these conditions that might be dispensed with.

*Cook Co. vs.  
Harms,  
108 Ill. 151.*  
*Baum vs.  
Covert,  
62 Miss. 112.*  
*Boody vs.  
R. & H. R. R.,  
24 Vt. 609.*

On another point, where the contract stipulated that the architect should be the sole judge as to what should be paid the builder for his work, in case of deviation from the contract, and considerable changes were made, it was held in Illinois that "Extras which amount to changing the work materially from the plans and specifications constitute a different work, not contemplated by the parties when the contract was made, and the contract then ceases to govern, and the contractor is not bound to accept such compensation as the architect may fix."

**Death of  
Contractor.**

*Gauss vs.  
Husmann,  
21 Mo. App. 343.*

**Death of  
Owner.**

*Meyers vs.  
Bennett,  
7 Daly, 471.*

It may be mentioned here that the death of the contractor terminates a building contract, unless some provision has been made in the contract for having it completed by the contractor's executors or other legal representatives. Where no such provision has been made, and the contractor dies, it has been decided in Missouri that sub-contractors and material men have no lien for work or materials thereafter furnished under the contract. The death of the owner, on the contrary, does not, except by special previous agreement, terminate a building contract, but it remains in full force, and is valid against his estate.

*Harder vs.  
Com.,  
97 Ind. 455.*

As in all other cases, however, it must be remembered that the principles here quoted are only applied by the courts where the parties have left the matter open for such determination, and that if they choose to provide for themselves, in their contract, a rule to be followed, the courts will enforce it, without regard to precedents or general considerations. Thus, where a contract stipulated that the owner should have the right to revoke the contract, if he was not satisfied with the work, and did revoke it, the Supreme Court of Indiana held that the contractor had no remedy for damages resulting from

the exercise of the right so reserved. As most building contracts now contain stipulations, by which the owner is empowered to terminate the contract under certain conditions, no claim for damages can be made for revocation made in accordance with these conditions. Moreover, in so serious a matter as a suit for damages for breach of a contract, it is necessary to be sure, not only that the conduct complained of is not expressly authorized by the contract, but that it is intentional and unmistakable; and this is particularly advisable where it is sought to prove that one party prevented performance by the other. Many decisions uphold the rule that "It is not every partial neglect or refusal to comply with some of the terms of a contract by one party which will entitle the other to abandon the contract at once. In order to justify an abandonment of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated or rendered unattainable by his misconduct or default."

Where a contract has been declared forfeited, under the stipulations of the agreement, it may be reinstated by mutual consent or implication, and the parties will then no longer be governed by the original revocation. In a New York case, the plaintiff, by an oral contract, agreed to erect for the defendant a building, in accordance with certain plans and specifications. The defendant, when the building was nearly finished, employed an architect to examine the work. The architect made a memorandum of defects and of the work that should be done to remedy them. This was accepted, and agreed to by the parties, and the plaintiff began work under the new agreement. The defendant then refused to allow the plaintiff to finish the building as required by the architect, and the work was stopped. The builder sued for payment for the work done, notwithstanding its agreed defects; and the Court of Appeals held that the new agreement was a waiver of forfeiture by reason of the non-performance of the old contract, and that the plaintiff was entitled to recover.

It occasionally happens that a contract is declared forfeited

Selby vs.  
Hutchinson,  
4 Gilm. 319.

Young vs.  
Preston,  
4 Cranch. 239.

Andrews vs.  
Montgomery,  
19 Johns. 275.

**Forfeited  
Contract May  
be Rein-  
stated.**

Fallon vs.  
Lawler,  
102 N. Y. 228.

through mistake or misconception. In such cases, however indignant the contractor may be, he has no claim for damages against the other party, if the mistake was an innocent one. In two cases, in the United States courts, it has been decided that "Where right of forfeiture is reserved in the contract, a forfeiture declared under it, through mistake of facts, does not authorize damages, unless the person upon whose judgment the forfeiture was to be made acted fraudulently."

*Culbertson vs.  
Ellis,  
6 McLean, 248.*  
*P. W. & B. R. R.  
vs.  
Howard,  
13 How. 307.*

*Adams vs.  
Boston Iron  
Co.,  
10 Gray, 495.*

Another case, which throws some light on the subject, is found in the Massachusetts reports. One Gray, as Treasurer of a company, contracted for four engines, to be set up in the company's works. The engines were nearly finished, when Gray himself made an assignment in bankruptcy. The engine-builders, fearing that Gray's company might be involved in his failure, carried away the portable parts of the engines, and gave notice that they would not complete their contract without further security. A new Treasurer was appointed, who, when he was asked whether the company wished the builders to go on and finish the engines, said that the corporation was not bound by the contract. In a suit by the engine-builders against the company, it was held that the agreement was discharged by the refusal of the builders to go on with the work, and could not be held binding on the company, without proof of some subsequent agreement by them that it should be completed.

## CHAPTER XXV.

### COMPLETION, ACCEPTANCE, DELAY AND FORFEITURE.

**W**E now come to four matters which give more trouble, perhaps, than any others connected with the settlement of building contracts. When a contract shall be considered to be completed, what constitutes an acceptance, when a contractor shall be held responsible for delay in completing his work, and what shall be the penalty inflicted upon him for such delay, are all questions which have frequently to be solved by the courts. As it happens, however, the courts are practically in accord in their treatment of them, and a study of the decisions which have been made already might save many an owner or contractor, who feels himself aggrieved, from spending his time and money in trying to gain for himself a decision at variance with principles so well established.

In most building contracts, it is stipulated that the work specified in the agreement must not only be completed, but completed to the satisfaction of some person indicated, and, in many cases, accepted by the owner, before payment is due; and the agreement also generally provides that, if the original contractor shall neglect or refuse, for a certain time, to do the work as agreed, the owner shall be at liberty to notify him that the contract is at an end, and to employ other persons to finish the work, and to charge the cost of completing it in this way to the account of the original contractor; and as, in

practice, all these points generally come up in any particular case, it will be convenient to consider them together.

In most cases, where an architect is employed, it is agreed by both parties that his certificate shall be the sole and sufficient evidence of the completion of the work as contracted for. It has been shown above, by many examples, that, where such an agreement has been made between the parties, it is almost indispensable that the certificate should be procured, before the builder can claim that he has completed his contract; but the rule is not absolutely without exception. Unless the contract provides, as it often does, that the architect's certificate shall be binding and conclusive upon both parties, it may be regarded, as it has been in New York, as simply *prima facie* evidence, which may be controverted by other evidence. In any case, whether the contract makes the certificate final or not, the courts will set it aside if it is shown to have been fraudulently given, and will release the builder from the necessity of producing it, if it appears that it is maliciously or fraudulently withheld. In Illinois, it has even been decided that a court may enter into the mental attitude of the architect who makes the certificate, and, if it finds that his decision was not based on his judgment, but on his arbitrary will, and neglected important facts, so as to justify a suspicion that he intended to oppress the builder, that it may set it aside, even though the contract expressly provides that it shall be final and conclusive on the parties. It is, moreover, to be remarked that, under any circumstances, the contract is paramount, even to the architect, and a contract requiring work to be done in a good and workmanlike manner, and appointing an architect with power to accept or reject it, does not authorize the architect to accept work not done according to the contract.

This is an important point, which is often lost sight of by builders and owners, as well as architects; and it is well settled that acceptance of work done under a contract, not only by the architect, but by the owner, does not waive defects in it. It is true that if there are obvious defects, and the

*Bigler vs.*  
Mayor,  
9 Hun 253.

*Glacius vs.*  
Black,  
50 N. Y. 145.

*Cook Co. vs.*  
Harms,  
108 Ill. 151.

*Louisville Ry.*  
*Co. vs.*  
Donnegan,  
111 Ind. 179.

*Glacius vs.*  
Black,  
50 N. Y. 145.

*Van Buskirk*  
*vs.*  
Murdan,  
22 Ill. 446.

owner, notwithstanding these, accepts and pays for the work, a presumption is raised that he intended to waive the objection that he might have made to them; but there is no presumption of the kind in the case of concealed defects; and it is well established that "notwithstanding acceptance, virtual or formal, unless expressly made in full discharge of the contract, if the work or materials are not as contracted for, the owner may recoup damages sustained in consequence."

One of the most instructive cases in which this principle is involved is that of *Trustees vs. Bradfield*, 30 Georgia, 1. The Trustees of the Munroe Female University contracted with the defendants to repair and remodel one of their buildings; to "remove certain walls, and put in such pillars as might be necessary to support the ceiling," and to do this and other work "in a neat and workmanlike style." The contract was to be completed in January, 1853, and was substantially completed about that time, and the building was occupied by the plaintiffs. It was proved that the plaintiffs were present during the execution of the work, and made no objection to anything that was done. In July, 1854, eighteen months after the completion of the building, a girder gave way in the chapel, allowing a part of the ceiling to fall, so that it had to be all taken down. Three days before the ceiling fell, the roof had been examined, and found leaky, and it was testified that the leakage increased the weight on the girder, and that "this was the cause of the fall." The girder, which was of chestnut, was found to be brashy and knotty, and there was expert evidence to the effect that it ought to have been supported by two more posts. It cost \$530 to repair the damage, and the Trustees sued the contractors for this amount, with damages, placing their claim at \$1,000. Two juries decided in favor of the defendants, but the Supreme Court reversed the decision, saying, "That the plaintiffs received the work, and paid for it, does not affect their right to recover in the slightest degree; it is not a circumstance to be considered against that right. They are entitled to recover, unless

*Estep vs.*  
Fenton,  
66 Ill. 467

*Trustees vs.*  
Bradfield,  
30 Geo. 1.

*Korf vs.*  
Lull,  
70 Ill. 420.

*Trustees vs.*  
Bradfield,  
30 Geo. 1.



*Trustees vs.  
Bradfield,  
30 Geo. 1.*

“they, at the time of the acceptance, knowing of the defective and neglected work, of the non-compliance by the defendants with their contract in all respects, expressly waived a performance of the contract, and agreed to pay the stipulated prices, notwithstanding; all of which must be made affirmatively to appear by the defendants, to be available to them as a defence.” . . . “The evidence in this case,” the Court went on to say, “falls very far short of this. Was the attention of the plaintiffs called to the fact that an important girder was brash, knotty, and entirely incapable of supporting the weight resting on it”? . . . “Their attention was not called to it, and they could not see and examine the girder for themselves, for it was concealed from their view by the floor on one side, and the overhead ceiling on the other.” It was claimed, for the defendants, that the insufficiency of the pillars was so evident a defect that the plaintiffs must have seen it; but the Court said, “True, they could see the number of pillars, but they were not informed as to the number necessary. The defendants undertook specially, in their contract, to put in such pillars as might be necessary to support the ceiling; they were to judge, and to judge correctly, at their peril.” . . . “The idea that they” (the plaintiffs) “were waiving any of their rights under the contract never entered their minds,” . . . “they accepted the work because they believed that the defendants had complied.”

It is possible to waive the requirements of the contract in regard to the completion and acceptance of the work, as well as in regard to any other matter mentioned in it, and this waiver, like other waivers, may be implied. The most common way in which the contract stipulations in regard to completion and acceptance are waived by implication is by the owner's moving into and occupying his building, and paying the contractor in full, without waiting for the architect's final certificate, or giving any formal expression to his acceptance. Nevertheless, it is very far from being the case that the mere occupancy of a building implies its acceptance from the

**Occupancy  
Does not Im-  
ply Accept-  
ance.**

contractor, if there is any reason why the owner should not consider that the contract has been satisfactorily fulfilled. A score of decisions, at least, place this point beyond a doubt. A builder once sued for the unpaid balance of the contract price for some work, which was, under the agreement, to be done in accordance with certain specifications, and paid for when finished, and approved by a certificate of a committee. The work was completed, except one sink, which was not in accordance with the specifications, and not satisfactory to the committee, and could not have been made to conform to the contract for less than \$100; and no certificate was obtained from the committee. The committee, however, took possession of the building, and occupied it. The contractor demanded payment of the balance due under the contract, on the ground that the committee, by taking possession, and occupying the building, virtually accepted it. The New York Court of Appeals, however, held that "If a contractor has neglected, and refuses, to complete his contract in a material point, it does not follow that the owner waives its performance by taking possession of, and occupying, the building in its defective condition." "An owner," said the Court, "is not put to so absurd an alternative as either to lose and abandon his building, worth perhaps ten thousand dollars, or to occupy it at the peril of paying for work not performed, or of waiving thereby the performance of any substantial covenant of the contractor."

In an Illinois case, the implied acceptance of the building by occupancy was complicated by the architects, who certified that the carpenter work, which, under the contract, included the plastering, was "completed," and that the plastering was "accepted," except filling up some cracks. The actual certificates read as follows:

"This is to certify that the plastering portion of the work on Mrs. L.'s house, on M. Street, Chicago, is accepted, with these exceptions: That the sides of the entrance to the attic are to be plastered, and the crack above the second story window finish is to be filled."

*Reed vs.  
Board, etc.,  
4 N. Y. 24.*

*Korf vs.  
Lull,  
70 Ill. 420.*

*Smith vs.  
Briggs,  
3 Denio, 73.*

*Smith vs.  
Brady,  
17 N. Y. 173.*

*Glacius vs.  
Black,  
50 N. Y. 145.*

*McCarren vs.  
McNally,  
7 Gray, 139.*

*Zaliski vs.*  
Clark,  
44 Conn. 218.  
—  
*Crane vs.*  
Knubel,  
43 N. Y. P. R.  
389.  
—  
*Flood vs.*  
Mitchell,  
68 N. Y. 507.  
—  
*Miller vs.*  
Phillips,  
31 Penn. St. 218.  
—  
*Hartup vs.*  
City,  
97 Penn. St. 107.  
—  
*Badders vs.*  
Denio,  
38 Ala. 367.  
—  
*Coey vs.*  
Lehmann,  
79 Ill. 173.  
—  
*Yeats vs.*  
Ballentine,  
56 Mo. 530.  
—  
*Wildev vs.*  
Sch. Dist.,  
25 Mich. 419.  
—  
*Robbins vs.*  
Blodgett,  
121 Mass. 584.  
—  
*Bosarth vs.*  
Dudley,  
15 Vr. 304.

And, a later one, "This is to certify that Mr. K. has completed the carpenter's portion of the work on a dwelling-house for Mrs. L., on M. Street, Chicago, and is entitled to the balance of the money due him, upon his proof that all debts for labor and materials used in the building have been discharged, or upon his giving proper orders for their discharge."

The owner took possession, and moved into the house, but refused to pay the balance of the contractor's bill. The contractor sued, on the ground that the work had been accepted in due form by the architects, for the owner, and that the owner had confirmed the acceptance, by taking possession and occupying the building.

The case was carried before the full bench of the Supreme Court of Illinois, which held, by the opinion of a majority of the judges, that the acceptance of a building by the owner did not waive latent defects, but that, if the architect certified that the work was completed, this waived defects in the plastering, because the architect ought to possess skill enough to detect defects in the plastering as the work progressed, and ought to have withheld his approval. Two judges, however, dissented, saying, in their dissenting opinion, that neither of the certificates certified that the terms of the contract had been complied with.

The New York courts seem to hold rather with the dissenting opinion in this case, for the Court of Appeals said, in *Smith vs. Brady*, 17 N. Y. 173, "The occupancy of a building is not a waiver of the plain requirements of the contract;" and it has repeatedly held that the certificate of the architect "cannot dispense with the substantial fulfilment of the provisions of the contract."

Notwithstanding the rule that mere occupancy, without any further formal act, cannot be construed as necessarily implying the acceptance of a building, it seems to be considered that acceptance need not be so formal an act as the making, or even the alteration of a contract. We have seen that a contract with a corporation can neither be made nor varied, except by

vote of the officers thereunto authorized, or a majority of them, if a majority is empowered to act for the whole, taken at a regular meeting, or at one called in accordance with the rules of the corporation represented; but it has been held that the acceptance of work done under such a contract is valid, even if made by parol only, and this rule has been applied in Massachusetts to the acts of County Commissioners.

Where the building has not been done at the time agreed, and where loss has been occasioned to the owner by the delay, a new series of claims arises, the settlement of which is rarely effected without difficulty. The more lax and improvident a contractor is in taking the necessary measures to insure the completion of the work that he has agreed to do, at the time when he has agreed to have it done, the more indignation he feels at the attempts of the person who has been the sufferer by his delay to make him bear a portion of the loss caused by his fault; and volumes might be filled with accounts of the fruitless struggles of contractors, under such circumstances, against the consequences of their own solemn engagements. At the same time, the law will not allow one party to oppress the other, by means even of a signed agreement, or to take advantage of contract stipulations to make gain by means of a default which he might himself have helped to bring about.

Stated briefly, the law on the subject of damages for delay beyond the time fixed by the contract for the completion of a building may be said to be, that the owner can recover, or retain out of the payments due to the builder, such damages as he may have actually suffered by the delay, even though the contract may have assigned no definite penalty; and he can recover or retain no more, whatever may be the forfeiture agreed upon in the contract.

It is not uncommon for owners, anxious to be sure of having, say a seashore house, ready for occupancy at a given date, to insist that the architect shall provide in the contract for an enormous forfeiture for each day of delay, thinking that by this means the builder will be stimulated to special effort. A

*Howard vs.*  
Ind. School,  
78 Maine, 230.

*Walker vs.*  
Fitchburg,  
102 Mass. 407.

**Damages  
for Delay.**

**A c t u a l  
Damage only  
can be Re-  
covered.**

provision of this kind, however, as most architects know, defeats itself, and the owner, however disappointed he may be, will only be able to hold the builder responsible, in case of delay, for about what it would cost him to hire a similar house for the time that he is kept out of his own, whatever may be the stipulation in the contract.

**Forfeitures  
and Liqui-  
dated Dam-  
ages.**

Most owners, and even some lawyers, reject this view of the matter, and say that if a builder signs his name to a solemn agreement to forfeit a certain number of dollars for every day's delay beyond a date specified for the completion of his work, he can be held to his agreement; but the great majority of Supreme Court judges think otherwise. The most logical position is that taken by the French Code Civil, which says, in Article 1670, "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next Article." (1671.) Article 1671 says, in regard to such cases as these, that where "from the nature of the case, it is impracticable, or extremely difficult, to fix the actual damage" which would result from a breach of the contract, a sum may be agreed upon beforehand; but not otherwise; and it is obvious that there would be few building contracts in which the actual loss to the owner from non-completion of his building could not be approximately ascertained. In this country, where there is no Code Civil to regulate such matters, the courts arrive at the same result by presuming, where an unreasonable forfeiture is imposed by the contract, that the parties did not really mean what they signed their names to, but intended only to provide for reimbursement for actual loss. The Supreme Court of Alabama once stated its position in regard to a contract forfeiture thus: "The court must ascertain whether the true intention of the parties was to afford fair and reasonable compensation for the loss sustained, in which case it is a real penalty, which can be apportioned to the actual loss sustained; or liquidated damages, which must be suffered without

*Hooper vs.  
S & M. R. R.,  
69 Alab. 536.*

*Ser. also,  
Watts vs.  
Shepard,  
2 Alab. 425.*

regard to actual injury resulting from failure to keep the contract. The tendency of the law is to regard the stipulation as a penalty, rather than as liquidated damages, and if there is any doubt as to the intention of the parties, it will be so construed; and even if the stipulation is for the payment of a sum in gross in case of failure to perform, the sum stated will still be considered as a penalty."

In practice, however, the courts go far beyond this. It will be observed that, in the Alabama decision, a distinction is made between a penalty, which is regarded as merely a provisional sum, out of which the actual damage may be taken, and liquidated damages, meaning by this a sum accepted and agreed by both parties, in making the contract, as the actual loss which would be inflicted by a breach of the contract, so as to avoid subsequent trouble and dispute in settling the exact sum; and the words of the Court give the impression that where the contract unmistakably stipulated for the payment, or forfeiture, by the builder, in case of delay, of a certain amount as "liquidated damages," the law would not interfere to set aside the valuation which the parties themselves had chosen to put upon the loss which would be caused by such delay; but, in a Missouri case, where the contract said that the sum mentioned as a forfeiture was to be regarded "not as a penalty, but as liquidated damages," the Supreme Court held that it was nevertheless to be construed as a penalty, and not as liquidated damages. In Wisconsin, in a contract for building a mill, it was provided that, in case of failure to fulfil the agreement, the builder should forfeit one thousand dollars, as "fixed and stipulated damages;" yet the highest court in the State held that the sum mentioned was not liquidated damages, but a penalty, and that only the actual damage could be retained out of it.

Many decisions, by the highest courts in various States, show the same tendency, which has even been formulated into a rule by the Supreme Court of Michigan, in the following words:

"The principle at which the law aims in awarding damages

*Shute vs. Taylor*,  
5 Met. 61.

*Fisk vs. Gray*,  
11 Allen, 132.

*Wallis vs. Carpenter*,  
13 Allen, 19.

*Bagley vs. Peddie*,  
5 Sandf. 192.

*Baird vs. Tolliver*,  
6 Humph. 186.

*Chiddick vs. Marsh*,  
1 Zab. 434.

*Whitfield vs. Levy*,  
6 Vr. 149.

*Taylor vs. Sandiford*,  
7 Wheat. 13.

*Owens vs. Hodges*,  
1 McMullen, 106.

*Moore vs. Platte Co.*,  
8 Mo. 467.

*Baye vs. Ambrose*,  
28 Mo. 39.

*Curry vs. Larer*,  
7 Penn. St. 470.

*Pat. Brick Co. vs. Moore*,  
75 Cal. 205.

*Fitzpatrick vs. Cottingham*,  
14 Wis. 219.

*Bradstreet vs. Baker*,  
14 R. I. 546.

*Jaquith vs.  
Hudson,*  
5 Mich. 122.

*Richmond vs.  
Robinson,*  
12 Mich. 152.

*Myer vs.  
Hart,*  
40 Mich. 517.

*Davis vs.  
Freeman,*  
10 Mich. 155.

*First C. Ch. vs.  
Walrath,*  
27 Mich. 222.

*Lanning vs.  
Dodd,*  
16 Vr. 325.

*Colwell vs.  
Lawrence,*  
26 N. Y. 305.

*Richards vs.  
Edick,*  
17 Barb. 299.

*Salton vs.  
Baile,*  
15 Abb. Pr. 272.

*Noyes vs.  
Phillips,*  
60 N. Y. 408.

*Giles vs.  
Spaulding,*  
5 Hun. 438.

*Sinclair vs.  
Talmadge,*  
25 Barb. 602.

*McConey vs.  
Wallace,*  
22 Mo. App. 377.

*Sperry vs.  
Fanning,*  
80 Ill. 371.

"is that of just compensation for the injury sustained; and "the parties will not be permitted by express stipulations to "set this principle aside." This is explicit enough; and the Michigan reports mention a case in which it was held that "Courts will not regard an unreasonable or excessive stipulation for damages."

It must not be supposed, however, that there is no use in providing in the contract for a forfeiture in case of delay. For the sake of both parties, it is desirable, if delay in completion is likely to cause loss to the owner, to have the probable amount of that loss for each day beyond the contract time of completion carefully estimated, and a stipulation for a forfeiture to that amount inserted in the contract. It is usually held that the rental value of the building, or the value of the use of it during the time that the owner is deprived of it in violation of the contract, form a just claim against the contractor, and where delay beyond a certain time would prevent using or renting the house for a year, as in the case of a seashore house, or summer cottage, it would undoubtedly be held that a year's rent would be a reasonable claim. Taking all these things into consideration, it is not difficult to estimate, at the outset, what sum will fairly reimburse the owner, if the builder should fail to keep his promise in regard to completion, and this sum will form the basis of the forfeiture which should be stipulated. Usually, a little margin is allowed, to cover unforeseen annoyance or expense to the owner, resulting from the delay; and, although a court would not allow any damage not actually shown to have been suffered, a reasonable builder would not object to a small provision for such contingencies. With a forfeiture clause of this sort, both parties are protected. Even if there is no forfeiture clause in the contract, the builder can be compelled to pay, on the general ground of damages for breach of the contract, whatever loss of rent the owner may have sustained by reason of the failure of the builder to complete at the time agreed; and he can be compelled to pay no more under a forfeiture clause;

while, with the latter, the sum that he must pay is fixed by agreement, instead of being ascertained by costly litigation.

The insertion of a forfeiture clause in a contract has, however, a special advantage for the builder, which is worth keeping in mind. A man, who may be called A, contracted to build a house for B, and to have it finished in two months; and it was further agreed that if A should have the building, with such additions as might be ordered, finished before the end of the two months, B should pay or allow him at the rate of \$225 per year for the time thus saved; and if they should not be finished within the time agreed, that A should make payment or allowance to B at the same rate for the time intervening between the actual time of completion and the date fixed by the contract. The building was not finished until three months after the expiration of the two months specified in the contract. Meanwhile, A gave to C an order on B for money on account of his contract, and B refused to pay it, on the ground that A had broken the contract by neglecting to finish the work within the agreed time. Suit was brought, and the question whether the delay constituted a breach of the contract came before the Supreme Court of Massachusetts, which decided in the negative, saying that the contract, "by necessary implication," allowed the contractor a further time, beyond the two months, for finishing the building, on condition of paying or allowing the liquidated damages specified for the delay. It was claimed that the contract did not contemplate so long a delay as three months beyond the agreed time of completion; but the Court said that, in the absence of any stipulation as to the length of time to be granted for delay under these conditions, the law considered that it should be a reasonable time, and it was for the jury to say whether three months was a reasonable time or not. In this case, the jury decided that it was a reasonable time, and the Court held that there had been no breach of the contract on the part of the builder, through the delay.

If there is no forfeiture clause, on the other hand, a failure to complete at the specified time constitutes a breach of the

*Folsom vs.  
McDonough,*  
6 Cush. 208.

*Farnham vs.  
Ross,*  
2 Hall, 167.

**Contract  
not Broken  
by Delay, if  
Builder Pays  
Penalty.**



*Sinclair vs.  
Tallmadge,*  
35 Barb. 602.

*Barber vs.  
Roe,*  
5 Hill. 76.

*McIntire vs.  
Barnes,*  
4 Colorado, 285.

*Nibbe vs.  
Braun,*  
24 Ill. 268.

*Paddock vs.  
Stout,*  
121 Ill. 571.

*Eyster vs.  
Parrott,*  
83 Ill. 517.

*Smith vs.  
Gugerty,*  
4 Barb. 614.

*Mayor vs.  
Butler,*  
1 Barb. 325.

*Ruff vs.  
Rinaldo,*  
55 N. Y. 664.

*Esmonde vs.  
Van Benschoten,*  
12 Barb. 366.

*Shute vs.  
Hamilton,*  
3 Daly, 462.

*Paddock vs.  
Stout,*  
121 Ill. 571.

*Meehan vs.  
Williams,*  
36 Abb. Fr. 73.

contract, which like any other breach of an entire contract, entitles the owner to terminate the transaction at once, while the builder loses his right to payment for his unfinished work. As the New York Supreme Court said, in *Sinclair vs. Tallmadge*, 35 Barb. 602, "It is the right of the owners to rescind the contract, after the day on which the work was to be done; and if they do so, the contractor cannot recover for the work done." This right, however, must be exercised in due time, or it will be considered to have been waived, and it will be assumed that the owner has consented to have the contractor finish his work, on condition of paying the damage caused by his delay. This was the condition of affairs in the case just cited, and the Court went on to say that, "If both parties, after the time has expired, treat the contract as still in force, and the contractor is suffered to go on under it, the claim of the owners will be limited to damages for non-performance as to time." It is said again, to the same effect, that "Where the owner permits the contractor to continue work after the expiration of the time within which the work was to be completed, he waives the right to rescind the contract on that ground, but does not thereby waive such damages as he may have sustained by reason of the delay."

The owner, may, however, waive by implication both his right to rescind the contract and his claim for damages, if his actions show that he did not, at the time, really consider himself to have been damaged. A man once, under a contract which specified a certain date for the completion of the work, not only allowed the contractor to go on with the work after the expiration of the contract time, but, when it was finally completed, accepted it, and paid part of the balance remaining of the contract price in cash, and the rest in notes. Later, he bethought himself of a plan for saving some of his money, by claiming damages from the builder on account of the delay of the work beyond the contract time of completion; but it was held that his previous actions amounted to a waiver of time of performance as fixed by the contract.

Where nothing is said in the contract about the time of completion, the law presumes that it was intended to allow a reasonable time; and it will usually be for the jury to say what is to be considered a reasonable time. In most cases, the jury will be tolerably liberal as to the proper length of time to be allowed, as where, in a contract for building stairs in twelve houses, it decided that a year was a reasonable time to allow for the job; but, if the contractor delays completion, in the absence of any agreement on the subject, beyond such period as the jury may approve, he is liable to pay damages, just as if there had been a time stipulated in the contract; and it has been held that, if the owner has already paid so large a part of the contract price that the balance would not be sufficient to reimburse him for his loss by the contractor's delay, he is entitled to recover any deficiency from the contractor.

A waiver by the owner of the condition of the contract for completion at a given time, or of his claim for damages by reason of delay beyond the time agreed, does not in the least impair the validity of the contract, or waive any other provision in it. Builders should bear this in mind, as it is a common, but very erroneous notion among them that if the owner waives one of his rights under the contract, he abandons them all.

It may happen, and, in practice, often does occur, that delay in the completion of a building is brought about by the fault of other contractors than the one who has bound himself to have it done on a certain day, or by the fault or interference of the owner himself; and it then becomes important to know what are the rights of the various parties. Where the delay is due to the fault of other contractors, the rule seems to be that the principal contract is, by implication, modified, so as to allow to the principal contractor an extension of time equal to the length of the delay caused him by others' fault, but that the contract remains in other respects in full force. It was held in Illinois, in such a case, that "Where one contracts to do certain work in such a way as not to delay other contractors, and to

**Fowler vs.  
Deakman,**  
84 Ill. 130.

**Hamilton vs.  
Scully,**  
118 Ill. 192.

**Austin vs.  
Wohler,**  
5 Bradw. 300.

**Stange vs.  
Wilson,**  
17 Mich. 342.

**Lowell vs.  
Allen,**  
14 Allen, 130.

**Langdon vs.  
Northfield,**  
42 Minn. 464.

**Waiver of  
One Stipulation  
of a Contract Does  
not Affect  
the Others.**

**Delay by  
Others' Fault.**

**Graveson vs.  
Tobey,**  
75 Ill. 540.

have it done on a certain day, and, by delays of other contractors, is unable to commence it until near the time set for completion, he is still held to the contract, except as to time of completion, and for unnecessary delay on his part will be liable to his employers for damages."

*Marsh vs.  
Kauff,*  
74 Ill. 189.

*Taylor vs.  
Benn,*  
79 Ill. 181.

*Tobey vs.  
Price,*  
75 Ill. 645.

*Week vs.  
McCarthy,*  
89 N. Y. 566.

Where the delay is caused by the fault of the owner, the contractor is entitled, not only to an extension of time proportionate to the delay caused him, but to reimbursement from the owner, if the delay has put him to increased trouble or expense, unless, as is sometimes the case, the contract provides that the owner may delay or postpone the work. If the contractor finds, however, that delay caused by the owner, or by other contractors, is likely to cause him increased expense, he should give notice as soon as possible, so that the owner may make arrangements, if necessary, to reduce the cost in some other way, or to hold those accountable who may have been the cause of the delay.

*Nelson vs.  
Pickwick,*  
30 Ill. App. 333.

If the delay is caused by other contractors, the decision of the question who shall be held responsible for damage to the owner, and to the other contractors, depends upon the contract, which usually makes some stipulation in regard to such matters. In one case, where the contracts provided that "each contractor shall be responsible for delay or damage to other contractors, caused by him," and one of the contractors was damaged and delayed by another, it was held that the one damaged could collect the amount of his damage from the owner, who was entitled to retain it out of money due to the contractor at fault.

*Haydensville vs.  
Art Inst.,*  
39 F. 484.

Another contract read, "Should delay be caused by other contractors, to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architects, provided it shall have given written notice to the said architects at the time of such hindrance or delay." It was held that these stipulations implied that there was to be no pecuniary compensation for delay to the plaintiff caused by other contractors.

A very curious case under this head was decided in New York. The contract was for the superstructure of a grain elevator, to be built for a company, and it was provided that the contractor should receive a premium of \$500 per day for each day that the building should be completed before the expiration of five months from the commencement. It was also provided that the company should put in the foundation, and should give notice when it was ready for commencing the superstructure. The company's engineer gave notice to the contractor to begin, and he did so; but the foundations were only partly ready, and the contractor was delayed in consequence. The contractor, in settlement, claimed that, if he had not been delayed, he would have completed the building before the contract time, and would have earned a premium, and he demanded \$500 a day for the time that he thought he would have saved. The case was carried up to the Court of Appeals, which decided that the contractor was entitled to recover damages for loss of the promised extra compensation, by reason of the failure of the company to finish the foundations properly before notifying the contractor to proceed. The question how much, if any, the contractor had really been delayed by the company's fault was, in the court below, referred to the jury, which found that he had been delayed by the incompleteness of the foundations, and that if they had been all ready when notice was given to commence work, the contractor would have finished the building 30 days within the allotted five months. The Court of Appeals did not consider this finding unreasonable, and allowed the contractor \$15,000, or \$500 a day for 30 days, as damages for being prevented by the owner from earning the same amount.

This must probably be considered an extreme case, as the estimation of how soon a contractor would have finished a building under different circumstances would generally be pure guesswork, and the law looks with disfavor on claims resting upon such a basis; but it is sometimes necessary that such questions should be decided, with such accuracy as may be

*Mansfield vs.  
N. Y. C. R. R.,  
114 N. Y. 331.*

**Premiums.**

*Sperry vs.  
Fanning,  
80 Ill. 371.*

possible under the circumstances. Thus, where a house is built under several contracts, and a claim is made for loss of rents, owing to the delay of a particular contractor, the owner must show that the building would have been completed in time for renting, except for the delay of that particular contractor.

Where the delay or neglect of the contractor is extreme, so that the owner has reason to believe that he is unable or unwilling to carry out his agreement, it is lawful for the owner, after giving proper notice to the contractor, to employ other persons to complete the work, and, that he may not lose the benefit of the contract which he has faithfully kept, while the other has violated it, the owner is entitled to charge the cost of completing the work by other parties to the original contractor.

*Ch. of Com. vs.  
Sollitt,  
43 Ill. 519.*

In nearly all written contracts, special provision is made as to the circumstances and terms under which this step shall be taken; but it is not necessary that definite stipulations should have been made. The Supreme Court of Illinois held, in such a case, that "If one party induces the other to believe that he has withdrawn from the contract, the other need not wait for the day of performance before making new arrangements, nor does he lose his remedy against the delinquent party by providing at once against losses likely to arise from such delinquency." In this case, a contract had been made by the Chicago Chamber of Commerce for some carpenter work in its new building. Before the building was ready for the carpenter work, the contractor sent word that the price of lumber had advanced, and that he could not carry out his contract unless he was allowed \$3,500 extra. The Chamber of Commerce, through its architect, replied to the contractor that his last proposal was rejected, and gave him notice that if he refused to go on with the work, it would be done by other parties, at his expense. He made no answer to this, and did nothing more about fulfilling his agreement. The Chamber of Commerce made a contract with other parties to do his work, at a

higher price than that for which he had agreed to do it ; and, on completion, brought suit against him for the difference between what it had been obliged to pay and his contract price ; and was successful.

Where it becomes necessary for the owner to take possession and complete in this way, he is allowed a considerable discretion in doing so, but he cannot waste the contractor's money by doing so in an extravagant or wasteful manner ; and it has been held that, where carelessness had been shown by the owner in this respect, he could not set off against the balance of the contract price the actual cost of completion, if this had been unreasonable, but only the reasonable cost.

If the owner wishes, he may complete the building by the day, after giving such notice to the contractor as the contract provides, or he may make a new contract with some one else, as may seem most advantageous ; and in either case, he is entitled to set off the amount actually expended against the balance of the contract price claimed by the contractor. Moreover, if any of the work done by the first contractor is found to be defective, or not according to the contract, the owner has a right, after the contract has been declared forfeited, and proper notice given, to cause such defective or improper work to be taken down and rebuilt, and the cost of doing so is held to be a proper part of the expense of completing the work which the original contractor must bear. In a Vermont case, it was even held that where the original contractor had offered to make good the defective work at his own expense, and the owner had refused to allow him to do so, and had employed some one else to do it, the owner could recover the cost of doing it from the original contractor.

In regard to the use of materials on the ground, belonging to the original contractor, there is often some question. Written contracts, if drawn up by competent persons, generally provide that, in case of forfeiture, the owner or his agent shall be at liberty to use such of the materials on the ground as may be suitable ; but this does not compel them to do so. Unless

*Tantholt vs.*  
*Ness,*  
35 Minn. 370.

*Scammon vs.*  
*Davis,*  
72 Cal. 393.

*Powers vs.*  
*Yonkers,*  
114 N. Y. 145.

*Clifford vs.*  
*Richardson,*  
18 Vt. 620.

*Wells vs.*  
Board of Ed.,  
78 Mich. 260.

such provision is made, however, it seems to be the rule that the owner should look out for the interests of the original contractor, by using the materials on the ground that are suitable, and would not be so valuable anywhere else, in preference to buying new materials, and charging him with the cost. In a Michigan case, the original contractor had furnished mouldings, made specially for the building, at a cost of \$83.25. The owner took possession, and completed the building, but used other mouldings in place of those furnished, which had to be sold for \$25. The Supreme Court held that the owner was liable to the original contractor for the loss.

*Sanford vs.*  
*Emery,*  
34 Ill. 468.

*Reynolds vs.*  
*Nelson,*  
6 Wend. 20.

*Selby vs.*  
*Hutchinson,*  
4 Gilm. 319.

In order that so serious a step as that of forfeiting a building contract, and employing other parties to complete the work, may be legally taken, it is necessary to follow all the stipulations provided in the contract, or, if this is silent on the subject, to give ample notice, and show a disposition to protect the interests of the original contractor in every reasonable way, compatible with the object of securing the completion of the work at the time, and in the manner, agreed upon in the beginning. A contract once gave the architect authority to declare the contract forfeited, in case of neglect or delay, and to have the work completed by other parties. He did so; and the original contractor sued for damages, on the ground that he was not in default, and that the architect had wrongfully declared the contract forfeited. The owner resisted, claiming that it was within the discretion of the architect, under the contract, to say whether there was default or not, and that this question was not, therefore, open to controversy. The Supreme Court of Minnesota held, however, that the right to declare default and forfeiture did not rest on the arbitrary discretion of the architect; and that the contractor was entitled to have the issue tried, whether he had fulfilled his contract.

*White vs.*  
*Harrigan,*  
41 Minn. 414.

It sometimes happens, where the owner has been liberal in making advances to the original contractor, that the cost of completing the work exceeds the balance of the contract price. In this case, the owner is entitled to recover the increase in

cost from the original contractor, and may recover, in addition, damages incurred through the breach of the contract by the latter. Where, on the other hand, the work is completed for less than the balance remaining due of the contract price, there is some doubt whether the original contractor is entitled to be paid the difference.

*Jackson vs.  
Cleveland,  
19 Wis. 400.*

A Maryland man named Hampson once contracted by parol with Lewis, a plasterer, for the plastering of five houses, at \$1,500; Hampson to furnish the materials. When the work was partially completed, and Lewis had been paid \$650, he abandoned it, alleging that Hampson did not furnish the materials as needed. After notice to Lewis, Hampson employed other mechanics to complete the work, which was finished at a cost of \$328. Lewis sued Hampson, to recover the difference between \$1,500 and \$978, being the sum of \$650 and \$328, adding some outside items, which brought his whole claim to \$850. The evidence whether Hampson had really neglected to supply materials was conflicting, and does not seem to have been much regarded, but it was held that Lewis was entitled to recover \$522, which was the difference between what Hampson had actually paid out for the work and the contract price, reserving to Hampson the right to deduct from this any damage that he might have suffered through Lewis' abandonment of the work.

*Hampson vs.  
Lewis,  
49 Md. 178.*

On the other hand, a man in California contracted to build certain buildings, for \$13,050, to be paid by weekly instalments on account, at the rate of seventy-five per cent of the value of the work done, as shown by the certificate of the architect, the balance of the contract price to be paid when the buildings were completed and accepted, and a proper certificate from the architect was produced. Before completion, the builder refused or neglected to go on with the work as provided in the contract, and the owner took possession, and finished the building himself. The builder, at the time of abandoning the contract, had been paid his weekly instalments of seventy-five per cent of the value of the work done, and \$200

*Blythe vs.  
Poultney,  
31 Cal. 233.*



or \$300 over. The cost of completing the buildings, added to what had been already paid to the builder, amounted to less than the contract price. The representatives of the original contractor sued the owner for the difference. The lower court decided in their favor, but the Supreme Court reversed the decision, saying that the original contractor "had received, "at the time he abandoned the contract, more than was due "him, and by abandonment lost the right which he would have "had to full compensation if he had completed the contract. "If he had sued, at the time he abandoned the contract, for "this balance, he would not have been entitled to recover it, "and he has done nothing since to cause it to become due "him."

*Hammond vs.*  
Miller,  
2 Mackey, 145.

The United States courts seem to hold the same rule, for, in a case in the District of Columbia, it was held that, "if completion costs less than the balance of the contract price, the contractor cannot recover the difference"; but a New York decision appears to incline to the Maryland view.

*Murphy vs.*  
Buckman,  
66 N. Y. 297.

In *Hampson vs. Lewis*, there seems to have been some reason to suppose that the owner was partly in fault, while in *Blythe vs. Poultney* the fault appears to have been all on the side of the contractor; but it would hardly be safe to draw any general inference from this circumstance. .

*Gillen vs.*  
Hubbard,  
2 Hilt. 303.

One point that is worth noticing is that, where the owner, either directly or by an agent, terminates the original contract, the relation of the architect is changed. It was held in New York, where the owner had terminated the original contract, and was completing the work through other parties, and suit was brought by a sub-contractor, that the certificate of the architect, which was necessary for payment, under the original contract, was no longer needed, as the owner was now his own contractor.

## CHAPTER XXVI.

### RISK AND RESPONSIBILITY.

**I**T often becomes a matter of deep interest to know which of the parties to a building contract is required to assume the responsibility for unforeseen contingencies, in cases where the contract itself is silent upon the subject. Builders, particularly, are surprisingly careless in relation to protecting themselves against unfavorable chances, and a reference to some of the more important decisions ought to have a good effect in putting them on their guard.

Among the unexpected occurrences which are likely to result in the ruin of builders, fire is the most important. It is also the most easily guarded against, by means of insurance, but, to save a few dollars in premiums, hundreds of builders expose themselves to certain bankruptcy, if a plastering stove should get overheated, or a spark from a workman's pipe go astray.

The general rule of law is that, under an entire contract, including, practically, all building contracts, if the building which forms the subject of the contract is destroyed before completion, the loss must fall on the contractor, who is still bound by his contract, and must rebuild the structure, on the same terms as before, or become liable to the owner for damages for breach of the agreement.

One of the leading cases on this point was decided in Connecticut. A man contracted to build a school-house, for a certain sum, and to have it done on a given day. It was

Sch. Dist. vs.  
Dauchy.  
25 Conn. 530.

*Adams vs.*  
*Nichols,*  
19 Pick. 275.

*Tompkins vs.*  
*Dudley,*  
26 N. Y. 272.

*Dermott vs.*  
*Jones,*  
2 Wall. 1.

*Sch. Trust. vs.*  
*Bennett,*  
3 Dutch. 515.

*Bramby vs.*  
*Smith,*  
3 Ala. (N. S.)  
123.

*Partridge vs.*  
*Forsyth,*  
29 Ala. 200.

*Hollis vs.*  
*Chapman,*  
36 Tex. 11.

*Cleary vs.*  
*Sohler,*  
120 Mass. 310.

*Cook vs.*  
*McCabe,*  
53 Wis. 250.

*Rawson vs.*  
*Clark,*  
70 Ill. 656.

*Schwartz vs.*  
*Saunders,*  
46 Ill. 21.

*Eaton vs.*  
*Sch. Dist.,*  
23 Wis. 374.

*Lumber Co. vs.*  
*Purdum,*  
41 O. S. 373.

*Andrews vs.*  
*Durant,*  
11 N. Y. 35.

nearly done, and \$1,000 had been paid on account, when, just before the day set for completion, and when there was no doubt that it would be done in time, it was struck by lightning, and burned. The committee requested the contractor to rebuild, and offered to grant a suitable extension of time; but he refused, claiming that he was released from his contract by the "act of God," this being the term used by lawyers to describe occurrences which human prudence could not foresee or provide against. The Supreme Court, however, held that he was not released.

The same doctrine was extended to apply to contingencies other than fire, in a decision which deserves to be quoted at some length, on account of the admirable statement of the law contained in it. The firm of Evernham & Hill, builders, contracted to build a school-house, according to certain specifications, annexed to the contract, for the sum of \$2,610, of which \$2,200 was to be paid in instalments, at the rate of \$300 when the first floor of joists was on; \$300 when the second floor of joists was on; \$1,000 when the building was enclosed; \$400 when the plastering was done; \$200 when the building was completed, except the rough-casting, and the balance to be paid when the whole was finished. When the building was partially erected, it was blown down by a gale of wind. The contractors rebuilt it, and, when nearly completed, the building again fell down. This time, the contractors, alleging that the second fall was caused by latent defects in the soil, refused to rebuild it. When the building fell the second time, instalments to the amount of \$1,600 had been paid to the contractors, and the school trustees sued to recover this amount from the contractors, with a further amount as damages for non-fulfilment of the contract. The suit was brought against Bennett & Carlisle, who had guaranteed the fulfilment of the contract by Evernham & Hill.

The plaintiffs simply proved the payments to the contractor, and the non-fulfilment of the contract.

The defendants offered to prove that the plaintiffs procured

the plan and specifications for the building to be made under the advice of builders or architects employed by them, and purchased the lot of land whereon the building was to be erected, and designated the particular location of the building, "and the precise elevation of said building, and its first floor"; and that the contractors or the defendants were not consulted about either the plan, specifications, lot, location or elevation; that the plaintiffs advertised for proposals to erect the building, and the contractors were the lowest bidders, and "proceeded to erect said building, and did erect it, in strict accordance with said specifications," and that, as each part was completed, the completion of which was a condition precedent to the payment of an instalment of the contract price, such completion was reported to the plaintiffs by the plaintiff's agents; that the work was done in a workmanlike manner, of proper materials, in strict accordance with the plans and specifications, and that the contractors exercised all proper care; but that, when the second tier of joists was on, a violent gale arose, without any of the usual premonitory signs of a storm, and prostrated the building. On rebuilding, the defendants claimed, after the building was enclosed, and nearly plastered, it fell, solely on account of the soil on which it stood having become soft and miry, and unable to support the weight of the building; that, at the time when the foundations were laid, the said soil appeared to be in all respects suitable for the support of such a building; that, "said soil was at that time so hard as to be penetrated with difficulty by the pickaxe," and that its defects were latent; that "said soil became soft and miry in the spring of that year, either by reason of the rising of the springs, or from other natural causes wholly beyond the control of said contractors; and that, by the uniform custom of the trade, the phrase, "with a cellar under the building, to be eight feet deep," is a trade phrase, meaning that the height of the foundation wall is to be of the depth of the cellar, measuring from the bottom of the cellar to the joists of the first floor.

*Harmony vs.  
Bingham,  
12 N. Y. 99.*

*Paradine vs.  
Jayne,  
Alleyn, 26.*

*Holtzapffel vs.  
Baker,  
18 Ves. 115.*

*Schwartz vs.  
Saunders,  
46 Ill. 21.*

The counsel for the plaintiffs moved to overrule all this evidence, on the ground that, if all these allegations were proved, they would constitute no legal defence to the action. The court below overruled it, and ordered a verdict for the plaintiffs, for the amount of the instalments paid, with interest ; and it was directed that the case should be certified to the Supreme Court, for its opinion on the following points :

1. Were all, or either of the facts offered to be proved on the part of the defendants competent evidence? If proved, would they constitute a valid legal defence to the action of said plaintiffs?

2. Should the damage occasioned to the part of said building first erected by the aforesaid gale of wind be borne by the plaintiffs or the defendants?

The Supreme Court replied thus: "If a party enters into "an absolute contract, without any qualification or exception, "and receives from the party with whom he contracts the "consideration of such engagement, he must abide by the contract, and either do the act, or pay the damages ; his liability "arises from his own direct and positive undertaking." Quoting *Bube vs. Johnson*, 19 Wendell, 500, the Court said, "If the "covenant be within the range of possibility, however absurd "or improbable the idea of execution may be, it will be upheld ; "as where one covenants it shall rain to-morrow." "To bring "the case within the rule of dispensation, it must appear that "the thing to be done cannot by any means be accomplished ; "for, if it be only improbable, or out of the power of the "obligor, it is not deemed in law impossible." . . . "No matter "how harsh, and apparently unjust in its operation the rule "may occasionally be, it cannot be denied that it has its "foundations in good sense and inflexible honesty. He who "agrees to do an act should do it unless absolutely impossible. "He should provide against contingencies in his contract. "Where one of two innocent persons must sustain a loss, the "law casts it upon him who has agreed to sustain it, or rather, "the law leaves it where the agreement of the parties has put it."

"If a party," the Court went on to say, "for a sufficient consideration agrees to erect and complete a building on a particular spot, and find all the materials, and do all the labor, he must erect and complete it, because he has agreed to do so. No matter what the expense, he must provide such a substruction as will sustain the building upon that spot, until it is complete, and delivered to the owner." . . . "If the difficulties are apparent on the surface, he must overcome them. If they are not, but become apparent by excavation, or the shrinking of the building, the rule is the same. . . . The cases make no distinction between accidents that could be foreseen when the contract was entered into, and those that could not have been foreseen. Between accidents by the fault of the contractor, and those where he is without fault, they all rest upon the simple principle,—such is the agreement, clear and unqualified, and it *must* be performed, no matter what the cost, if performance be not absolutely impossible." "The whole defence," said the Court, "was properly overruled, because it did not show the performance of the contract impossible, or any lawful excuse for non-performance of the contract."

*Schwartz vs.  
Saunders,*  
46 Ill. 21.

It was decided in this case that where the contract price was to be paid in instalments, and some of the instalments had been paid, they could be recovered back from the builder; and several other decisions support this view; but in a Missouri case, where the contract price was to be paid by instalments, as certain portions of the work were finished, and the building was destroyed by fire before completion, it was held that the builder was entitled to be paid the instalments that were fully earned at the time of the fire, but not a proportionate part of the next instalment, which had been partially earned.

*Richardson vs.  
Shaw,*  
1 Mo. App. 234.

This ruling, so contrary to the general tenor of the decisions, probably depended upon some peculiarity in the wording of the contract; but a difficulty might arise where one of the parties had insured his interest. Evidently, if the owner had

his interest insured, he could collect from the insurance company the amount of the instalments that he had paid, for he would have an insurable interest in the building to that extent, and he would not be allowed to recover the same amount over again from the builder ; while, if the builder had insured his interest, he could not collect from the insurance company the amount of the instalments that the owner had paid, because they would represent the owner's interest, and not his. There would be, therefore, a difficulty in applying the principle where either party was insured, and, even if neither was insured, there might be a question whether the owner, if he neglected to protect by insurance the interest that he acquired by the payment of instalments, ought to be entitled to make the builder suffer for his neglect. It is a familiar principle of law that every one is expected to take reasonable care to protect his own life and property ; and the argument might be made that reasonable care, in such cases, should include insurance.

Eichelberger  
vs.  
Miller,  
20 Md. 334.

A case illustrating this point is to be found in the Maryland reports. A carpenter had partly finished a house which he was building under contract, when it was burned. The lumber had been insured in the name of the owner, who, under the contract, furnished it. The owner furnished new lumber, and the house was finished, and paid for, according to the contract. The carpenter then sued for an additional amount, as the value of his work on the lumber that was destroyed by the fire. The Supreme Court held that he was not entitled to demand payment for his work on the lumber, until it was built into the house ; and that, as he had an insurable interest in the lumber, as bailee, to the value of his work on it, and had failed to insure that interest, he must bear the loss. In this case, the contract read that payments should be made "as the work progresses," and the builder claimed that this meant that payment was due for work done, whether the worked material was built into the house or not ; but the Court held that the words were to be construed to mean, "as the work upon the building progresses."

In practice, such a question ought not to be left open, and the contract should always provide for the insuring of both the builder's and owner's risk.

In a Michigan case, where a building was in process of erection, and was burned before completion, it was held that if work enough had been performed before the fire for the owner to receive benefit from it, or if he had sold the building, he would be bound to pay for the benefit he had received. This decision is a little obscure. The report does not give much information about the circumstances, but it may be that the Court considered that the owner, by his actions, had assumed the care of the building before the fire. This is often the case. In Tennessee, where the owner moved into his house before its completion, it was held that he thereby became responsible for the price agreed to be paid, and that if thereafter, and before full completion, the house was destroyed by fire, the owner, and not the contractor, must bear the loss.

An apparent exception to these rules is to be found in cases where the contractor depends, for doing his work, on circumstances, which are constructively, at least, within the control of the other party. A man once contracted to put pews in a church, and had partly completed his work. Before he had finished it, the church and its contents were destroyed by fire. The maker of the pews sued for the value of what he had done, and recovered it, the Court holding that the owners of the church were, by implication, bound to keep the building in condition to receive the pews, and that the plaintiff was entitled to recover for the work already done, up to the time of the fire.

In a New York case, the plaintiffs contracted to put heating apparatus in a hotel, and to have it done at a given time. They had nearly finished their work, although the agreed time of completion was past, when the building was burned. The defendants refused to pay for the heating work which had been done, but were defeated, the Court of Appeals holding that they were under an implied obligation to have the building ready, and in condition to receive the work contracted for.

*Fildew vs.  
Beesley,  
42 Mich. 100.*

*Galyon vs.  
Ketchon,  
85 Tenn. 55.*

*Lawing vs.  
Rintles,  
97 N. C. 350.*

*Haynes vs.  
2d Bapt. Ch.,  
88 Mo. 285.*

*Niblo vs.  
Binsse,  
3 Abb. Pr. 375.*



Lord *vs.*  
Wheeler,  
1 Gray, 282.

It is to be noted that a fire may release the owner, as well as the contractor, from his agreement. A man in Massachusetts contracted with a builder for some repairs to his house. Before the work was done, the house was burned. A controversy arose as to whether the owner was still bound by his contract with the builder; and the Supreme Court held that he was not, saying that, "With the subject perishes the incident."

Gibbons *vs.*  
U. S.,  
15 Ct. of Cl. 174.  
109 U. S. 200.

After a fire has occurred, there may be a question as to which party is responsible for the condition of the ruins, in case it is rebuilt. This point has been considered by the United States courts, which say that, if a building is partly destroyed by fire, and a contract is made for rebuilding, and the ruins are turned over to the contractor just as the fire left them, the contractor is responsible for their fitness to receive new work; but if the owner has pulled down a part of the walls before making the contract to rebuild, this indicates that he has assumed the responsibility for their condition.

There are various other matters in regard to which a certain risk must be assumed by one party or the other, and a few decisions in regard to them will be of value.

Connors *vs.*  
Hennessy,  
112 Mass. 96.

Brackett *vs.*  
Lubke,  
4 Allen, 138.

Forsyth *vs.*  
Hooper,  
11 Allen, 419.

Linton *vs.*  
Smith,  
8 Gray, 147.

Hilliard *vs.*  
Richardson,  
3 Gray, 349.

A man named Hennessy once agreed with one Mulholland to raise his house, and put an extra story under it, for the sum of \$700, Mulholland to furnish all materials, and to paint and complete the alterations, to Hennessy's satisfaction. While the work was going on, the house fell over on the adjoining house, owned by Annette Connors, who sued Hennessy for damages. She was defeated, the Court holding that the contractor, Mulholland, was alone liable. The Court said: "The distinction on which all the cases turn is this: If the person employed to do the work carries on an independent employment, and acts in pursuance of a contract with his employer, by which he has agreed to do the work on certain specified terms, in a particular manner, and for a specified price, then the employer is not liable. The power of directing and controlling the work is parted with by the employer, and given to the contractor."

In the same way, where a man had employed a mason and a carpenter to work for him, and one of the masons fell from a defective ladder made by the carpenter, it was held that the owner was not liable for the mason's injuries, since he did not employ the carpenter to make or furnish ladders for any one but himself; and if the mason chose to use the carpenter's ladders, he must look to him for the damages or defects in them, not to the owner of the building.

In another case, the question whether the contractor or the owner had the control over the work which rendered him responsible for its performance had to be inferred. The defendants applied to certain contractors, through their foreman, for tin-work, to repair a gutter between their store and the adjoining one, which they rented to the plaintiffs. The foreman, and one other man, came to do the work, and one of the defendants went on the roof with them, and told the foreman what he thought should be done. He also told him to do the work when he thought that there was not going to be any rain. The tinmen removed the gutter, and rain came on, injuring the plaintiff's goods. The question was whether the defendants or the contractor's foreman had the direction and responsibility of the work, but the Court thought that the defendant's language to the foreman was inconsistent with the notion that he did not have control of the work, and held that he and his partner were liable.

A very curious exception was made to this rule by the Massachusetts Supreme Court in a later case. The firm of Gross & Strauss contracted with a firm of masons for the building of a party wall, under a party wall agreement. The new wall was built in very cold weather, and when it was up to the fourth story, and the fourth story beams were on, the weather became warm, and the wall softened and fell, injuring the adjoining building. The wall that fell was proved not to have been well braced, but the work, so far as it had gone, had been accepted by the architect. There was some evidence that the party wall had been weakened by fines, which had been put in

*Mercer vs.  
Jackson,*  
54 Ill. 397.

*Stevens vs.  
Armstrong,*  
6 N. Y. 433.

*Seammon vs.  
Chicago,*  
25 Ill. 424.

*Mumby vs.  
Bowdon,*  
25 Fl. 454.

*Gorham vs.  
Gross,*  
125 Mass. 232.

at the request of the adjoining owner. Under these circumstances, the counsel for Gross & Strauss contended that the contractors were alone liable, in accordance with the rule followed in the cases mentioned above; but the Court applied to the case a principle entirely different, in accordance with which it gave judgment for the plaintiff. This principle was described by the court as follows: "The general rule of law is that the person who for his own purposes brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so, is, *prima facie*, answerable for all the damage which is the natural consequence of its escape." . . . "This rule has been applied to dangerous animals; to cesspools; to reservoirs, and to accumulations of snow and ice upon a building, by reason of the form of its roof."

A Wall as a  
Wild Animal.

From this it appears that a wall built in cold weather, or not sufficiently braced, is, in Massachusetts, a sort of dangerous animal, which the owner keeps at all times at his peril. Whether it would be so considered in other States we have no means of knowing, as there seem to be no decisions on the point; but the possibility should be sufficient to put the proprietors of badly constructed buildings on their guard.

Burke vs.  
Dunbar,  
123 Mass. 499.

Still another Massachusetts case involves a different point. A man agreed to build sea-walls for a wharf, of certain dimensions, and in a thorough and workmanlike manner, at a fixed price, but in a location left indeterminate. The owner subsequently decided on the location, and staked out the walls, where there seemed to be a sand and gravel bottom, which both parties thought would give a good foundation. As the work progressed, it proved that the sand covered a stratum of mud, fifteen feet deep at the outer end of the proposed wharf, and less at the sides. As soon as the contractor discovered the insufficiency of the foundation, he notified the owner, who told him to do his best to save the wall, and soon afterwards sent an experienced person to superintend the work. This person had a row of piles driven outside the end of the wall,

and paid the contractor an extra price for putting the foundation stones already laid at this end on the piles, and for increasing the thickness of the end wall. He did not, however, object to having the side walls built without piles. The side walls settled, and the owner refused to pay for the work, claiming that if the contractor, who was a builder of walls, while he was himself unskilled in such matters, after negligence and deceit in obtaining the contract, built the walls on insecure foundations, it was his own fault; and that it was at least his duty to have notified the owner of defects in the foundation, before building walls upon them. The judge in the lower court instructed the jury that the contract did not require the contractor to furnish pile or other artificial foundations for the walls; that, if the contractor had any knowledge of the insufficiency of the foundation, which the owner did not have, he should have notified the owner; but that, if he disclosed to the owner all his knowledge or grounds of belief of defects in the foundation, and what he discovered as the work progressed, and the owner allowed him to proceed without objection, he did all that the agreement required, so far as the foundations were concerned. Under these instructions, the jury returned a verdict for the contractor, and the Supreme Court, on appeal, sustained the instructions and the verdict.

The principle of the sole responsibility of an independent contractor for the consequences of his operations has another exception, in cases where the contractor is a sub-contractor under a principal contractor. In these cases, the principal contractor may be held responsible for the negligence or misconduct of the sub-contractor. In two cases in New York it has been held that a principal contractor was liable for injury resulting from the negligent performance of excavation by a sub-contractor, where the sub-contractor was doing the work under the supervision or direction of the principal contractor.

There is sometimes a question of the responsibility for the accuracy or sufficiency of the plans or specifications for a piece

*Burke vs.  
Dunbar,  
128 Mass. 469.*

*Hart vs.  
Rvan,  
6 N. Y. Supp.  
921.*

*Burn vs.  
Dillon,  
16 Wkly. Dig.  
368.*

*Thorn vs.*  
London,  
45 L. J. Exch.  
487.

of work, and the question may be a very costly one to decide. In an important case against the city of London, where the contractor had been nearly or quite ruined by too great dependence on the plans and specifications, it was decided by the highest court in England that "where a person asking for tenders for the execution of a certain work prepares plans and specifications for the information of intending contractors, he does not thereby enter into any implied warranty that the work can be successfully executed according to such plans and specification." In this case, the intending contractor was told that the descriptions given were believed to be correct, but were not guaranteed; and in at least one particular he was warned to make examination for himself.

*Clark vs.*  
Pope,  
70 Ill. 128.

*Wade vs.*  
Haycock,  
25 Penn. St. 382.

*Bentley vs.*  
State,  
73 Wis. 416.

The contractor has, however, a compensation for this severe rule in the fact that where a contractor agrees to build according to certain plans and specifications, he is discharged from responsibility if he conforms to them, or, according to some courts, to the directions of the owner. If, on the other hand, the contractor deviates without the consent of the owner from the plans or specifications, he becomes responsible for the strength and safety of the building. The State of Wisconsin employed an architect, who furnished plans and specifications for a State House, and superintended its erection. According to the plans and specifications, the plates under the iron columns, in several tiers, carrying girders, were one inch thick, and of the size of the base of the column. The girders also, which were doubled, rested on the cap of the column below, and the plate for the column above was placed on the girders. There were also other faults in design. The iron-work was carried out by a contractor approved by the architect. One of the wings fell, as alleged, on account of these defects in the design. At the request of the State, the contractor restored it, according to amended plans, furnished by the State, and made by other architects. The State refused to pay the contractor for rebuilding the wing that fell; but it was held that the State warranted the sufficiency of the original plans, and was liable

to the contractor for the expense of restoring that part of the building destroyed by their defects.

In Missouri, a decision has been given as to the owner's duty in regard to plans, of somewhat similar character, although his responsibility for them is in this case not to the builder, but to his neighbors. The Court said in this case, "It is the owner's duty to use all reasonable care and caution in providing plans and specifications, to the end that the erection, when made in accordance with them, would not be dangerous to the adjoining property."

Lancaster vs.  
Conn.  
92 Mo. 460.

## CHAPTER XXVII.

### FORMS OF CONTRACT.

**W**E have followed the architect, owner and builder through the principal troubles to which building operations expose them, and it now remains to make some suggestions, in more definite shape than those contained in the preceding chapters, by which such troubles can, in most cases, be avoided. It is hardly necessary to point out to any one who has interested himself in these pages that nearly every misfortune which occurs to builders, owners and architects, in connection with their business affairs, proceeds from an oversight or misunderstanding in regard to the contract under which the work has been, or is to be, done. It occasionally happens that builders and owners suffer in consequence of their ignorance or forgetfulness of the local statutes and ordinances regulating building, or the mechanics' lien laws of their State. Such mishaps can only be avoided by familiarity with these laws and regulations. It is not uncommon for the compilers of "builders' handbooks," and similar works, to increase the size of their publications by adding "digests" of the mechanics' lien laws, and sometimes of the building laws, of the different States and cities; but building laws, and, still more, mechanics' lien laws, are in a constant state of transition, so that the handbook digests, even if they state the laws correctly on the day of publication, which is by no means always the case, are

**Digests of  
Mechanics'  
Lien Laws  
Unreliable.**

tolerably sure to be misleading as to their condition a year or two later; and reliance upon an erroneous statement of laws of this sort is more dangerous than total ignorance. For this reason, it has been considered best not to attempt anything of the sort in the present work, but to refer those who wish to know what the statute law on the subject may be at a given time in any particular State to the latest edition of the Revised Statutes of that State, including the annual additions. With regard to forms of contract, the case is very different, and, although it has not seemed advisable, in view of the diversity of the conditions which must be provided for in building contracts, to present any form as being absolutely the best, there will be advantage in reviewing some of the common forms, perhaps showing how they might be improved, both by additions and omissions, and to add a few examples, which have been tested by actual use, and present types suited to varying circumstances.

It will be remembered that the modern practice among architects is to make the first page of every specification consist of a set of General Conditions, which form a part of the specification, and are thus impliedly agreed to by every one who offers to do the work in accordance with the specification. These General Conditions, in large offices, are usually printed, and it should be the aim of the one composing them to have them include everything, outside of the technical details of workmanship, that a bidder needs to know in order to make a fair estimate of the cost of his work; so that he will not have occasion, on being asked to sign the formal contract, to say that an addition must be made to his estimate of cost, to cover expenses required by the contract, of which he had not had warning.

**General  
Conditions.**

Like all other legal documents, they should be as condensed and clear in language as possible, but, as the greater part of the lawsuits in regard to building contracts turn upon points usually included in the General Conditions, they should leave nothing out, and express nothing obscurely; and a blank space



should be left for insertion of stipulations for special occasions. For most purposes the following form is as good as any we know, and, as readers of the foregoing chapters can believe, nearly every sentence has been the subject of a lawsuit in which its meaning has been determined.

#### SPECIFICATIONS

of Labor and Materials for.....  
to be built.....  
for.....  
from the plans and under the superintendence of.....  
architect, ..... Street, .....

*General Conditions.*— Each contractor is to provide all materials and labor necessary for the complete and substantial execution of everything described, shown, or reasonably implied in the drawings and specifications for his part of the work, including all transportation, scaffolding, apparatus and utensils requisite for the same; all materials to be the best of their respective kinds, and all workmanship to be of the best quality.

Each contractor is to set out his own work correctly, and is to give it his personal superintendence, keeping also a competent foreman constantly on the ground; and no contractor is to sublet the whole or any part of his work without the written consent of the owner. The architect or his authorized representative is to have at all times access to the work, and may by written notice require any contractor to dismiss forthwith such workmen as he deems incompetent or careless, and may also require any contractor to remove from the premises such of his materials or work as in his opinion are not in accordance with the specification, and to substitute without delay satisfactory work and materials, the expense of doing so and of making good other work disturbed by the change to be borne by the said contractor; and each contractor is also at his own cost to amend and make good any defects, settlements, shrinkage or other faults in his work arising from defective or

improper materials or workmanship which may appear within twelve months after the completion of the building; and is to clear away from time to time the dirt and rubbish resulting from his operations, and cover and protect his work and materials from all damage during the progress of the building, and deliver the whole clean and in perfect condition. All work and materials are to comply in every respect with the building laws, city or town regulations and the directions of the Inspector of Buildings, and such building laws, regulations and directions are to be considered as a part of this specification and the contract to which it relates. Each contractor is to give to the proper authorities all requisite notices relating to work in his charge, obtain official permits and licenses for temporary obstructions, and pay all proper fees for the same and for use of water for building, and entrance into sewers or drains, and is to be solely answerable for all damage, injury or delay caused to other contractors, to neighboring premises or to the persons or property of the public, by himself or his men, or through any operations under his charge, whether in contract or extra work.

The contractor for the mason-work is to have charge of the premises, subject only to the right of other contractors, the owner and the architect or his representative to have free access thereto, until the (*plate*) (*sill*) is on, and is to provide and maintain all requisite guards, lights, temporary sidewalks and fences during that time; afterwards the contractor for the carpenter-work is to take charge in the same way until the whole is completed.

Each contractor is to carry on his work at all times with the greatest reasonable rapidity, under the direction and to the satisfaction of the architect. The several portions are to be completed on or before the following dates:

.....  
 .....  
 .....

.....

It will be observed that the General Conditions come under the principal heading of the specification of which they form the first page. This is important, as it has been claimed, where the General Conditions were printed on separate sheets, and simply bound in with the specification, that not being incorporated with the contract, and not, apparently, forming an integral part of the specification mentioned in the contract, they were a mere extrinsic matter, not binding on the contractor. Whether this reasoning would prevail might depend on circumstances, but it is the object of the precautions suggested in this chapter to cut off all possibility, even of argument.

Transporta-  
tion to be  
Paid for by  
Contractor.

The importance of the first paragraph will be best appreciated by architects who have had much experience with extra bills, and who know, among other things, the proclivity of contractors, especially in the country, for having their materials sent them by express, and charged by the expressman to the owner's account; and the first sentence of the next has had the attention of the New York Court of Appeals, which, it will be remembered, attached great importance to it. In regard to the provision that no part of the work shall be sublet without the written consent of the owner, the necessity for which needs no argument, it may be observed that some architects prefer to stipulate that it shall be the architect's written consent, rather than the owner's, which is to be obtained before subletting. While it is true that the architect probably knows more than the owner about the character and reputation of sub-contractors, it is generally better for the architect to place the actual responsibility of accepting or rejecting them upon the owner. The latter can make such inquiries of the architect as he wishes on the subject, and is likely to be governed by his judgment; but, in case he should have, as frequently happens, a personal prejudice against some particular mechanic, he will not be at all pleased to find that the architect, without

Consent to  
Sub-letting.

his knowledge, has accepted that mechanic as sub-contractor for an important part of the work on his house ; while the architect not only loses, by assuming a function which more properly belongs to one of the contracting parties, something of his authority as a disinterested adviser, but exposes himself to the libellous insinuations, which contractors of a certain class are very fond of making, and which receive more credence than they deserve, of being dishonestly interested in favor of a particular set of mechanics. It may be remarked, in general, that the architect should avoid, as far as possible, acting in the owner's place. Young architects like a client who leaves everything to them ; but as their experience increases, they realize the fact that it is better for all parties to have the duties and responsibilities of each kept distinct.

The clause empowering the architect to require, by written notice, the dismissal of incompetent or careless workmen is an unusual one, but experience has shown it to be valuable. The control which the trades' unions exercise over contractors is so despotic as to make it difficult for a contractor to discharge a workman for misconduct, and the assistance of the architect is often useful in getting rid of the worthless men ; while nothing can so effectually protect the owner against the workmen whom the architect catches surreptitiously smoking their pipes among the shavings at their bench, or driving in screws with hammers, or playing, at the expense of the owner, the tricks in which some of them are expert, as to compel their immediate discharge. Moreover, the fact that the architect found a workman doing his work so badly or carelessly as to make it necessary to demand his discharge, a fact which should be duly noted at the time, will do much to guard the interest of the owner and architect, in case of a subsequent controversy as to the way in which a contract has been carried out. The same observations will apply to the rest of this sentence, which, it will be noticed, is as much in the interest of the contractor as of the owner, inasmuch as it states at length what sort of warranty will be required, in time for the

**Dismissal  
of Careless  
Workmen.**

**Contractor's  
Warranty.**

contractor to make his estimate accordingly, instead of leaving it for a jury, after the completion of the work under a less definite agreement, to say how far the implied warranty extended.

**Compliance  
with Local  
Regulations.**

The provision that the contractor shall comply with the local building laws and regulations is often incorporated in the final contract, instead of the General Conditions prefixed to the specifications; but, as there may be regulations which would add to the cost of the building, and as, in any case, a bidder would be likely to allow something for the expense of complying with the orders of the official inspectors, who are often capricious in their demands, it is only fair to give notice of what will be required in connection with the specifications, where allowance can be made for it in the estimates.

**Responsi-  
bility for  
Care of Build-  
ing.**

Where several contractors are concerned in a building, the question who is responsible for its safety, and for keeping up the proper guards, is often a serious one, and should not be left for chance, or a jury to settle; and, with ordinary buildings, it is convenient to divide the responsibility as here indicated.

**Successive  
Dates for  
Completion.**

The time within which the entire building, or successive portions of it, must be completed, should be specified in the General Conditions, as well as in the contract, so that bidders will have no excuse for withdrawing from their proposals on the ground that they did not know the limitations of time; and it will be found, in practice, very conducive to the completion of the building within the contract time to assign dates, according to the architect's judgment, for the completion of successive portions. Where nothing but the time of final completion is specified, the architect is often seriously hampered in pushing the work with the rapidity that he knows to be necessary to get it done within the contract time. He may be certain, when the work is half done, that the other half cannot possibly be finished at the time agreed, but, if, in answer to his representations, the contractor simply asserts that he can easily do it, as he is apt to do, the architect is, to a certain extent, obliged to be content. If the contractor's neglect is

very glaring, he can, under the usual contract, advise the owner to declare a forfeiture, but where he has only his own judgment to rely upon, he runs the risk, in taking such a step, of bringing upon himself an action for damages, unless he can convince a jury that his opinion was well founded. If, however, the contractor has agreed to have the various instalments of the work completed on certain dates, a failure to complete the first portion, or any portion, at the specified time will, without possibility of question, enable the owner to take possession of the work, for completion by other parties, in time to have it done at the time when he wants it.

It will probably be objected to the foregoing remarks that they show an unfair animus against the builder, in suggesting the possibility that he may wish to employ bad workmen or sub-contractors, or may be careless about getting his work done in time, while they say nothing about any possible delinquencies on the part of the owner in performing his part of the contract. The answer to this is that, under most building contracts, the owner has but one, or at most, two duties to perform; those of making payments at specified times, and in some cases, of insuring the builder's interest against fire; while the builder must, necessarily, undertake a multiplicity of duties. It is the object of a proper contract, in the interest of both parties, to make the statement of all these duties, on both sides, as clear and detailed as possible, and to provide means for enforcing the performance of them. Against the owner the builder has a much more ample remedy than the owner has against him. If the owner fails to make payments at the time agreed upon, the builder may, in some States, treat the contract as broken, and collect, at his option, either the contract price for what he has already done, with his probable profits on the remainder of the contract, or the value of what he has done, at day-work prices; and in other States, where failure to make interim payments, arranged for the convenience of the builder only, does not involve the rescission of the contract, there is no doubt that the owner would be obliged to

**The Formal  
Contract.**

**The En-  
forcement of  
Contracts.**

pay whatever loss might be occasioned to the builder by his neglect; and it is to be remembered that money due to the builder for work done can, if the owner fails to make payments as he has agreed, be collected by the summary process of laying a mechanics' lien on the estate. On the other hand, while the owner is not armed by law with any such advantages over the other party to the contract as are given to the builder, there are a thousand ways in which the latter, by failure to supply such workmanship or materials as he has agreed to furnish, or to get the building done at the time when he has agreed to complete it, may cause the owner very great loss, and it is the right of the latter to protect himself against such loss. In order to do so without having continually to call in the aid of arbitrators or juries, it is greatly to the advantage of both parties to have some specified person appointed, who shall decide without appeal whether any given work or materials conform to the specifications, and whether necessity exists for extending the agreed time of completion on any account; and to provide a manner in which this person's rulings shall be enforced, besides assigning reasonable penalties for securing compliance with other stipulations of the contract. It is obvious that it is useless to make contracts, if there is no way by which either party can be held to the performance of his agreement; and where, as in building contracts, the choice is between fixing beforehand, by mutual consent, the manner of enforcement, and leaving it indefinite, which means having a jury fix it, the former is infinitely to be preferred.

Keeping this consideration in mind, the composition of a satisfactory building contract is not very difficult. Of course, the advice of an expert in building matters, who knows the points to provide for in matters of construction, and understands the conduct of building operations, is necessary in drawing the technical part, and, this being arranged, the rest consists mainly in making clear, reasonable and consistent provision for enforcing the technical part of the agreement. If this is done, in such a way that no one can have any doubt

as to what is intended, little more will be needed, and, if the contract should come into court, which is not likely, since courts have little to do with documents that the parties to them can themselves understand, it will be easily and cheaply enforced.

Most building contracts, or rather, the more formal portions of them, begin by reciting that the contractor agrees to "build completely," or to "build, erect, complete and finish," or "make, erect, build and finish," the structure which is the subject of the contract, or the particular portion of the work to which it applies. Occasionally, a form is seen in which the contractor promises only to "provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared" by certain architects. This is the form adopted in the current edition of the Uniform Contract of the American Institute of Architects and the National Association of Builders, which is reprinted at length at the end of this chapter, but it is objectionable, for the reason that drawings and specifications, however complete, cannot possibly describe and represent everything involved in the construction of a building. Undoubtedly, honest builders, in signing such an agreement, intend to erect complete the structure which their experience has shown them to be intended by the drawings, and to take the drawings and specifications as guides in regard to points about which there might be doubt; and this is what the owner supposes that the other party intends to do; but it is quite possible for a dishonest builder to use such a contract for purposes of sheer robbery. No provision is made in the contract referred to for any tribunal for deciding what the drawings and specifications really show, and the contractor is therefore empowered to demand from the owner either an extra payment, or a trial by jury, or by arbitrators, in regard to every point in the construction of the building, from the hollowing of the bottom of the trenches for the hubs of the drain-pipes to the setting-in of the nails which hold the finial on the roof, which is not, in his opinion, both mentioned in the

**The Difference Between Building a House and Performing Work Shown on Drawings.**



specifications and shown on the drawings. Undoubtedly, the intention of using this clause, instead of the usual provision, is to protect builders against being imposed upon by being required to do more work than they supposed to be intended by the drawings on which they estimated; but to show on drawings all the details of a building is neither practicable nor necessary. The important lines can be shown, but to attempt anything beyond this only results in obscuring the more essential part; yet, under the official form, the builder is only obliged to do what is actually shown on the drawings, as well as described in the specifications, without regard to what any reasonable man would say that the parties really intended. It would, of course, be better to specify that the agreement should cover all work mentioned in the specifications *or* shown on the drawings; but any agreement which binds the builder only to carry out what he chooses to assume to be shown by drawings less than 1-2,000, and often only about 1-10,000 the full size, and thirty or forty pages of manuscript specifications, puts a premium on rascality. There is no real need of protecting the builder against the imposition of extra work by means of drawings, furnished him subsequent to the signing of the contract. If they do not show such a building as the drawings on which he based his estimate, he has only to refuse to execute them, and to go on with the work as originally shown, to enforce his contract. In most cases, the architect, on being notified of the discrepancy between the contract drawings and the new ones, would modify the latter, or arrange for an extra price for carrying them out, so that everybody's interests would be protected. Even where, as is common, the agreement recites that the contractor shall execute the work in accordance with the drawings and specifications, including all things which, in the opinion of the architect, "may fairly be inferred from such drawings and specifications to be intended, without being specially stipulated," no oppression of the contractor is possible; for, on the principle that fraud vitiates all contracts, any suspicion of bad faith on the part of the architect, if alleged in the

pleadings, would be sufficient to refer the question of what the contract drawings really meant to the decision of a jury, in case the owner, with the architect's help, should try to compel the builder to execute extra work without charge, or claim damages from the builder for not obeying orders to execute it.

Another important clause, in most building contracts, stipulates that the work shall be carried out to the satisfaction of the architect or architects specified. This clause is omitted from some of the cheap forms of contract sold at the stationers' stores, in which brevity is the quality most sought for, but it is of great importance, as appointing, by agreement, the person whose judgment is to decide whether the contract has been properly carried out or not. As in all other cases, only the decisions of the architect which are made in good faith, and with reasonable care, are binding on the parties, and the advantage of having all controversies in regard to the execution of the work decided by the person who knows most about the circumstances, instead of being referred to the costly decision of a jury, or the still more costly award of arbitrators, is incalculable. The official form of the American Institute of Architects, unfortunately nullifies the effect of this clause, and opens the way for endless controversy, by reciting that the contractor shall perform the work, and furnish the materials, under the direction and to the satisfaction of the architects, "acting for the purposes of this contract as agents of the said owner." The intention of this interpolation is, probably, to save contractors the annoyance of obeying orders given by the architect, under the supposition that they would be paid for doing so, and finding, later, that the owner had given no authority to the architect to order work done at his expense, and that none could be implied from a contract in the usual form. A less happy device for avoiding what is, undoubtedly, sometimes a serious trouble, could hardly be conceived. To understand the expression at all, it is necessary to define what "the purposes of this contract" are. If they are to secure the construction for the owner of a good and substantial building, the

**The Satisfaction of the Architect.**

**The Architect's Agency for the Owner.**

**Objections  
to Arbitra-  
tion Clause.**

architect is, for that purpose, the owner's agent already, and is accepted as such by both parties, by various parts of the agreement. If any other purposes are intended, they should be specified, as nothing is calculated to give more trouble to all persons concerned than the bestowal of an undefined agency on one of them. To judge from the context, it would appear that the architect is intended to be regarded as the owner's agent in accepting the work as satisfactory, or, in other words, that, instead of being an independent, expert judge, to whose decision both parties defer, he is to be considered as the owner himself. It is a familiar principle of law that no man can be judge in his own case, and it may be doubted whether this expression would not destroy the validity of all the acts done by the architect under the contract, in the way of certifying accounts, or determining damages. The next three articles of the Institute form are unobjectionable, except in providing for the valuation of work added or omitted, in case either party objects to the architect's award, by three arbitrators. It cannot be too strongly impressed upon the minds of persons intending to build, and of those expecting to build for them, that arbitration is one of the most costly, and least satisfactory, modes of settling a dispute. Even if the architect's award does not satisfy one of the parties, he is likely to be better off to accept it than to appeal to arbitrators, who are always tempted to give each party half of what he claims, after deducting a handsome compensation for themselves; and, although people often agree to an arbitration clause, in the expectation that it will save them from law-suits, it should be remembered that neither party is bound by such an agreement. In the language of the law, any agreement is void which "ousts the courts of their jurisdiction," and either party may, if he thinks fit, refuse, at any time before the award of the arbitrators is made, to be bound by it, and demand a trial by jury. Under these circumstances, it is much better for both parties, if the architect is a man in whom they have confidence, to erase the arbitration clause, and commit

matters of the sort to his decision, which is at least as likely to be fair as that of arbitrators, and costs nothing. If it is unfairly given, the courts will set it aside, and, if the parties consent, will appoint a referee to judge between them, so that the provision for arbitration is not only needless as a protection to either party, but exposes each to constant demands from the other for arbitrations on all sorts of trifling points.

In Article VII, the official contract introduces another uncertainty, by saying that "Should the contractor be obstructed or delayed in the prosecution or completion of his work by the neglect, delay, or default of the Owner, or the Architects, or of any other contractor employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no default of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all the causes aforesaid." The difficulty is here that no one is specified who shall determine whether the contractor was delayed by his own fault, or by that of the owner, or the architect; nor is it stated who shall decide what constitutes a "cyclone"; and, where no other judge is constituted, only the arbitrators, or a jury, can decide. The latter part of the Article indicates that the architects, having power to decide upon the length of the extension to be allowed, would have something to say as to whether anything should be allowed, but this is made too uncertain. A better, though less formal practice is to combine the provision for extension of time of completion with that for forfeiture for delay, with which it properly belongs, saying that the contractor shall forfeit and pay the specified sum for every day's delay after a given date, "unless in the opinion of the architect such delay shall have been due to causes which could not reasonably have been foreseen by the contractor or with reasonable care and diligence avoided." This gives to the person who knows most about the circumstances, and who, unless the contract has

**Uncertainty  
in Contract to  
be Avoided.**

incautiously made him the agent of the owner, stands in a perfectly impartial relation, the sole judge of the matter, so long as he acts fairly. If he acts unfairly, his decision can be set aside, but it is far better to rely on his honesty than to open the door, as is done by the clause in question, for an endless series of arbitrations and lawsuits of the most expensive kind. It is worth bearing in mind that, as the records of courts show, almost all building cases, where the architect is not directly accused of fraud, and a good many in which he is, are decided in accordance with the architect's opinion, as shown in the testimony, and both builder and owner will generally be better off to yield to his opinion in the first place.

**The Right  
to Order Al-  
terations.**

Returning to Article III, we find it stipulated that "no alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the Architects." In other words, the person for whom the house is built, who pays for it, and expects to live in it, cannot make any changes in it as the work goes on; while the architect, with whom he may not, perhaps, be on the most friendly terms, is empowered to make any changes or additions that he chooses, without his knowledge or consent, and to compel him to pay for them. It is surprising that any owner should be found willing to employ an architect on such terms, or that architects should be willing to assume such absolute control over the wishes and fortunes of their clients. Where building contracts are drawn up by lawyers, as is common where work is to be done for corporations, the rights of the owner, as the person who pays for and uses the building, and of the architect, as the owner's trusted adviser, are generally observed by stipulating that "the owner may, with the consent of and through the architect, at any time direct any alteration in, addition to, or omission from, the plans and specifications or work above mentioned." . . . with, often, an additional clause, to the effect that "the architect shall have the right to direct such changes in construction as in his judgment shall become necessary or desirable during the progress of the work, provided that the

same shall involve no additional expense"; or, more concisely, "The Architect may in writing and from time to time order the Contractor to make any changes in the work which do not increase the cost to the Owner or affect the time of completion. . . . In no case shall any change be made in the work which shall increase the cost of the work to the Owner, or involve any extension of time, without his express and special consent."

Practically, it is generally necessary to allow the architect to give verbal orders for details of workmanship which do not involve any extra cost, or extension of time, as such orders must be given on the spot, and at the time when they are to be carried into execution; but it is best to have all orders which either increase or diminish the cost given by the owner, or with his express consent. If his consent is only required for additions, he will sometimes be unpleasantly surprised, on the completion of his house, to find that something that he particularly wanted has been left out, by the architect's order, and, although an allowance may have been made for it in the price, this will not do much to soothe his resentment.

**Verbal Orders of the Architect.**

With the few exceptions noted, the official form of contract of the Institute, which is also the official form adopted by the National Association of Builders, may be commended as useful. There are, however, provisions which might, on occasion, be added, and which it will be well to consider.

For example, it is sometimes advisable, where the solvency of the contractor is open to doubt, to insert a clause, providing that "All materials shall become the property of the party of the first part, (the owner), as soon as they are delivered on the ground, subject only to the right of the party of the second part to remove surplus materials at the completion of the building, but no materials are to be paid for before they are set in place in the work." The object of this clause is to convey the title to materials delivered to the owner of the building, and thus prevent the assignees or creditors of the contractor from claiming them, or removing them from the ground, in case of the contractor's bankruptcy.

**How to  
Guard Owners  
Against  
Employer's  
Liability.**

It is also necessary, in States where the employer's liability laws have an Anarchist flavor, to use special precautions to guard against attempts of persons who have been, or pretend to have been, injured in the course of their work on the building, to fasten liability upon the owner of the estate. It is evident that if, as in the Institute form of contract, the architect is made the general agent of the owner, an ingenious lawyer can trace nearly every occurrence in or about the building to the directions of the owner, given through his agent, the architect, and thereby make the owner, as his principal, pecuniarily responsible for any damage to any one resulting from such occurrences. In this attempt the ingenious lawyer would be warmly seconded by the jury, which usually assumes that the owner's pocket should be the unfailing fountain of consolation for the woes of all persons with whom his building operations have brought him temporarily in connection; and nothing but unmistakable stipulations will relieve the owner from liability. In the contract given as the third form at the end of this chapter, which is a good example of a lawyer's building contract, it is recited that "The contractor shall furnish all transportation, scaffolding, apparatus, ways, works, machinery and plant requisite for the execution of this contract, and shall be solely answerable for the safe, proper and lawful construction, maintenance and use of the same"; and, in regard to the architect, it is distinctly stipulated that "Neither the Architect nor any person employed by him shall have any control or direction over the progress of the work, except the power of rejecting it, nor any control or superintendence over the scaffolding, apparatus, ways, works, machinery or plant, the sole responsibility for which shall rest with the Contractor; and neither of them shall have power to order extras or alterations, except as above provided, or any authority other than that expressly set forth in this contract. The Architect shall not be deemed the agent of the owner for any purpose whatsoever, except as the Owner may in fact give him a special and express authority." It may be remarked that the expression,

"scaffolding, apparatus, ways, works, machinery and plant," which is again repeated in another place, is that used in the Massachusetts statute relating to employers' liability.

As builders of standing usually keep their liability as employers insured, they have no interest in shifting such liability on the owner, and it is obviously essential that the latter should be protected by the insertion in the contract of some such provision as this.

The last point to be considered is that of insurance. The rules of insurance companies vary at different times, and in different places, and as, in order to be sure that all interests are protected, it is necessary to specify in the contract the mode to be employed, the parties should know something of the current practice. Where the insurance companies will draw a policy in that form, the best way is to stipulate that the owner shall insure the risks of all the contractors, as well as his own, payable, in case of loss, as the interests of the parties may appear. In this way the owner can be sure that all the risks are covered. Where the insurance companies will not write a policy payable to more than one person, the builder should be required, as a part of his contract, to keep his interest insured. Builders are apt to neglect this, for the sake of saving a few dollars, and, if a fire occurs while they have a large risk in the building, they are very likely to be thrown into bankruptcy, and the owner has then to begin the work over again with the assignee, or some other contractor; so that it is well to stipulate that the builder's policy shall be satisfactory to the architect, and shall be deposited in his hands for safe-keeping. Where the insurance companies refuse to insure more than a certain portion of the full value of risks, the owner and contractor should be careful not to bind themselves to do more for each other than they can do for themselves.

Of the three following forms of contract, the first is the official form adopted by the American Institute of Architects and the National Association of Builders, and is the composition of

**Insurance  
Clause in  
Contracts.**

**Three Forms  
of Contract.**



a joint committee of the two bodies. This committee is a standing one, and the form receives periodical modification, as experience may show to be advisable. Those persons who desire to use it must apply to the sole licensees under the copyright, the Inland Architect Press, 79 Tribune Building, Chicago. The other two forms are not copyrighted. No. II is a form drawn up for general private use; the third was prepared by a lawyer, of great experience in building matters, in consultation with his architect, for use where the interests involved were too important to leave any point vague or unconsidered. It will be observed that there is no punctuation in the second form, except at the end of the sentences. This is in imitation of the English practice, in which it is considered that if a sentence can be made clear without punctuation, it is better to leave it so, and thereby avoid the risk of having its sense accidentally or purposely altered by changing such punctuation as it had originally.

I. FORM OF CONTRACT ADOPTED AND RECOMMENDED FOR  
GENERAL USE BY THE AMERICAN INSTITUTE OF ARCHITECTS  
AND THE NATIONAL ASSOCIATION OF BUILDERS.

.....ARCHITECTS.

*This Agreement*, made the.....day of  
.....in the year one thousand eight hundred and ninety.....  
by and between.....  
.....  
.....party of the first part  
(hereinafter designated the Contractor), and.....  
.....  
.....party of the second part  
(hereinafter designated the Owner),.....  
*Witnesseth* that the Contractor, in consideration of the

fulfilment of the agreements herein made by the Owner, agrees with the said Owner, as follows :

**Form I.**

**ARTICLE I.** The Contractor under the direction and to the satisfaction of

..... Architects,  
acting for the purposes of this contract as agents of the said Owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said Architects for the.....

.....  
which drawings and specifications are identified by the signatures of the parties hereto.

**ART. II.** The Architects shall furnish to the Contractor such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the Contractor shall conform to the same as part of this contract so far as they may be consistent with the original drawings and specifications referred to and identified, as provided in Art. I.

It is mutually understood and agreed that all drawings and specifications are and remain the property of the Architects.

**ART. III.** No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the Architects, and when so made, the value of the work added or omitted shall be computed by the Architects, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three (3) disinterested Arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen ; the decision

**Form L.** of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference.

**ART. IV.** The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architects or their authorized representatives. He shall, within twenty-four hours after receiving written notice from the Architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the Architects shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

**ART. V.** Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architects, the Owner shall be at liberty, after..... days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall also be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such

## Form I.

excess shall be paid by the Owner to the Contractor, but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architects, whose certificate thereof shall be conclusive upon the parties.

ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times hereinafter stated.....  
 .....  
 .....  
 provided that.....  
 .....  
 .....

ART. VII. Should the Contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the Owner, or the Architects, or of any other contractor employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no default of the Contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the Architects within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the Architects, but appeal from their decision may be made to arbitration, as provided in Art. III of this contract.

ART. VIII. The Owner agrees to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor,

**Form I.** agrees that he will reimburse the Contractor for such loss ; and the Contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), then he shall make good to the Owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architects or by arbitration, as provided in Art. III of this contract.

**ART. IX.** It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be \$.....

.....  
subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the Owner to the Contractor in instalments, as follows :

.....  
.....  
.....  
The final payment shall be made within.....days after this contract is fulfilled.

All payments shall be made upon written certificates of the Architects to the effect that such payments have become due.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner or the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify him against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor's default.

**ART. X.** It is further mutually agreed between the parties hereto that no certificate given or payment made under this

contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

ART. XI. The Owner shall during the progress of the work maintain full insurance on said work, in his own name and in the name of the Contractor, against loss or damage by fire. The policies shall cover all work incorporated in the building, and all materials for the same in or about the premises, and shall be made payable to the parties hereto, as their interest may appear.

ART. XII. The said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

*In Witness Whereof*, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

*In presence of*

.....[SEAL]  
 .....[SEAL]  
 .....[SEAL]  
 .....[SEAL]

II. *Contract for Building* made this.....day of  
 .....in the year.....by and between  
 .....  
 .....party of the first part  
 and.....  
 .....  
 .....party of the second part.

**Form II.**

**Form II.**      The said.....party of the second part for.....and each of.....heirs executors administrators and assigns hereby covenant... and agree... to and with the said party of the first part.....heirs successors and legal representatives for the consideration hereinafter mentioned to make erect build and finish for the said party of the first part on.....land.....  
 .....  
 .....  
 including all the.....  
 .....  
 and to furnish all the materials of every kind labor scaffolding and cartage for the full completion of the said..... such labor and materials to be in strict accordance with the drawings and specifications made by..... architect which said drawings and specifications are to be taken and deemed as part of this contract and including all things which in the opinion of the said architect may fairly be inferred from such drawings and specifications to be intended without being specially stipulated all the materials to be in sufficient quantity and where the quality is not otherwise described in the specification to be of the best quality and the workmanship throughout to be of the best quality and the whole to be executed in a good substantial and workmanlike manner subject to the directions from time to time and to the satisfaction of the said architect and to be completely finished and delivered on or before the..... day of.....

And the said party of the first part hereby promises and agrees in consideration of the foregoing covenants being strictly kept and performed by the said party of the second part to pay to the said party of the second part the sum of.....  
 .....in.....payments as follows :  
 .....  
 .....  
 .....

**Form II.**

and the balance.....days after the said work shall have been completely finished and delivered and accepted by the said party of the first part unless some defect shall meanwhile have been discovered therein *provided however* that no payment shall be made except on the written certificate of the architect or some other person thereto authorized by the said party of the first part that in his opinion the work for which such payment is to be made is properly done and the payment is due said certificate however not exempting the party of the second part from liability to make good any work so certified if it be afterward discovered to have been improperly done or not in accordance with the drawings or specifications and provided further that prior to each payment by the party of the first part a satisfactory certificate shall have been obtained to the effect that the said building and estate is at the time when the payment is made free from all mechanics' liens and other claims incurred by the party of the second part.

*And* the said parties hereto hereby further agree as follows :

1. That the drawings and specifications are intended to co-operate so that any works shown on the drawings and not mentioned in the specification or vice versa are to be executed by the party of the second part without extra charge the same as if they were both mentioned in the specification and shown on the drawings.
2. The said party of the first part or the said architect with the consent of the party of the first part shall be at liberty to order any variations from the drawings or specifications either in adding thereto or diminishing therefrom or otherwise however and such variations shall not vitiate this contract but a fair and reasonable valuation of the difference shall be added to or deducted from the contract price as the case may be and the architect shall have power to extend the time of completion on account of alterations or additions so ordered such extension to be certified by him to the party of the first part at the time when such order for alterations is given. Orders for changes which do not affect the value of the work may be given orally



**Form II.**

but no order which increases or diminishes the value of the work or affects the time of completion shall be valid unless given in writing.

3. Neither the whole nor any portion of this contract shall be assigned or sublet by the party of the second part without the written consent of the party of the first part.

4. If the said party of the second part shall fail to complete the said works including all variations should such be made at or before the time agreed upon with such extension in the case of extra work as may have been made and certified by the architect then and in that case the party of the second part shall forfeit and pay to the party of the first part the sum of .....dollars for each and every day that the said work shall remain unfinished after that time unless in the opinion of the architect such delay shall have been due to causes which could not reasonably have been foreseen by the party of the second part or with reasonable care and diligence avoided the said sums to be retained as liquidated damages out of any money that may then be due or may thereafter become due to the said party of the second part.

5. All materials shall become the property of the party of the first part as soon as they are delivered on the ground subject only to the right of the party of the second part to remove surplus materials at the completion of the building but no materials are to be paid for before they are set in place in the work.

6. If the said party of the second part shall become bankrupt or insolvent or assign.....property for the benefit of creditors or become otherwise unable.....to carry on the work or shall at any time for six days neglect or refuse to do so in the manner required by the architect or his authorized representative.....or shall neglect or refuse to comply with any of the articles of this agreement then the said party of the first part or.....agent shall have the right and is hereby empowered to enter upon and take possession of the premises with the materials

Form II.

and apparatus thereon after giving two days' notice in writing and thereupon all claim of the said party of the second part .....executors administrators and assigns shall cease and the said party of the first part or.....agent may after using such of the materials already on the ground as may be suitable provide other materials and workmen sufficient to finish the said..... works and the cost of the labor and materials so provided shall be deducted from the amount to be paid for work and extras under this contract without prejudice to any other remedies for breach thereof.

7. The party of the second part shall be solely responsible for all loss or damage to.....own work or any part of it until the whole is delivered and accepted loss by fire alone excepted and shall keep.....interest in the building at all times insured to an amount not less than..... and shall if required deposit the policy with the architect for approval and safe-keeping and shall give all necessary assistance to the other workmen employed in the building and shall be solely responsible for all delay or damage caused to..... work or materials or to neighboring property or to the persons or property of the public by.....workmen or through any of.....operations, either in contract or extra work.

8. ....  
.....  
.....  
.....

And for the faithful performance of each and every the the articles and agreements hereinbefore contained the said parties hereto do hereby bind themselves their heirs successors executors administrators and assigns each to the other in the penal sum of.....  
.....firmly by these presents.

In witness whereof the said parties hereto have hereunto set

their hands and seals the day and year first above written.

*In presence of—*

..... }  
 ..... }

**Form III.**

**III. BUILDING CONTRACT**

between.....of.....  
 hereinafter called the Owner and.....  
 .....of.....hereinafter called the Contractor,  
 made at.....the.....day of.....18....

The respective parties hereto, each in consideration of the agreements of the other herein set forth, agree with each other as follows : —

**THE CONTRACTOR'S AGREEMENT.**

**General Description of the Work.**

**Plans, Specifications, etc.**

The Contractor agrees to.....  
 .....  
 according to certain plans and specifications prepared by.....  
 .....of.....Architect. Said plans and specifications, together with this contract, of which they are to be deemed a part, are to be construed together, so that any work shown on the plans, though not mentioned in the specifications, or *vice versa*, or any provision of the contract not repeated in the plans or specifications, or *vice versa*, is to be executed by the Contractor as a part of this contract. Figured dimensions are to prevail over scale. All things which in the opinion of the Architect may fairly be inferred from the plans and specifications are to be executed by the Contractor as a part of this contract. If complete drawings of detail have not yet been made, the same, when made and conforming to said plans and specifications, are to constitute a part of this contract, the Architect being the sole judge as to whether said detailed drawings conform to said plans and specifications. All the plans and drawings received by the Contractor at any time

during the continuance of this contract are at its termination to be returned to the Architect.

All material and work, where the quantity, dimensions, and quality are not shown on the plans or specified in the specifications, are to be furnished in sufficient quantity and of sufficient dimensions for the proper execution of the work as determined by the Architect, and the quality and workmanship are to be the best throughout, and satisfactory to the Architect.

**When Quantity, etc., is Unspecified.**

The Contractor is to take out at his own expense all necessary permits from the municipal or other public authorities, to give all the notices required by law or municipal ordinance, and to pay all fees and charges incident to the due and lawful prosecution of the work covered by this contract.

**Permits, Notices, etc.**

If this contract involves excavation or mason-work, the Contractor is to execute the same without encroaching upon adjoining public or private property, and shall procure for the owner the certificate of some competent surveyor, to be selected by the owner, that there has been no such encroachment; unless the plans themselves provide for such encroachment, in which case the Contractor shall be relieved from all responsibility as to the correct location of the walls and foundations in this respect.

**Building Lines.**

The Contractor shall devote his time and personal superintendence to the execution of this contract, and shall employ a competent foreman or clerk of the works, who shall at all times be present while any work is being done under this contract, at the building.

**Personal Superintendence, etc.**

The entire work and all its parts, including material, workmanship, and rate of progress, shall be satisfactory to the Architect. All materials rejected by the Architect, whether worked or unworked, and whether affixed to the building or not, shall be removed from the premises (and for that purpose taken down if already attached to the building) at the request of the Architect; and all work condemned by the Architect, as in any way unsound or as not conforming to the terms of this contract, shall be taken down forthwith and rebuilt by the

**To Satisfaction of the Architect.**

Contractor in accordance with the contract and in a manner satisfactory to the Architect. The Contractor shall dismiss any of his employees if the Architect considers said employee incompetent or careless and so informs the Contractor.

**Dirt and  
Rubbish.**

The Contractor shall clear away all dirt and rubbish caused by his operations as often as requested by the Architect or Owner, and shall leave the premises at the termination of this contract free from such dirt and rubbish and in a neat and clean condition.

**Time for  
Completion.**

The Contractor shall prosecute the work speedily and continuously.....

.....and the entire work covered by this contract shall be finished by the.....day of ..... , 18 . The damages for default are fixed at..... dollars for every day thereafter that the said work shall remain unfinished.

**Defective  
Work.**

The Contractor shall make good all defects, omissions, and violations of the terms of this contract whensoever discovered, during the progress of the work or afterwards, notwithstanding any payments that may have been made, or any certificates that may have been given, or any possession or acceptance of the work by the owner, and shall be responsible for any damages that may be caused in making good said defects, omissions, or violations.

**Building  
Laws.**

The Contractor shall comply with all the laws, ordinances, and regulations for the time being in force in the city or town where the building is situated and relating to the building or other work included in this contract, and shall satisfy all the requirements of the Inspectors (if there be such).

**Ways, Ma-  
chinery, etc.**

The Contractor shall furnish all transportation, scaffolding, apparatus, ways, works, machinery, and plant requisite for the execution of this contract, and shall be solely answerable for the safe, proper, and lawful construction, maintenance and use of the same; he shall cover and protect his work from

damage, and all injury to the same, before the completion of this contract, shall be made good by him; and shall be solely answerable for all damage or delay to the Owner or his property, to other contractors or employees of the Owner, to neighboring premises, or to any person or property, due to the improper, illegal or negligent conduct of the Contractor, or of his sub-contractors, employees, or agents, in or about the said building or the execution of the work covered by this contract or any extra work undertaken as hereinafter provided.

The Contractor shall have sole charge and possession of the work covered by this contract until the termination thereof; but shall permit the owner and the Architect and any person employed by either of them to visit, enter, and inspect the said work at all times and places during the progress thereof, and shall provide safe and proper facilities for such inspection.

The Contractor shall permit other contractors or employees of the owner to prosecute their work, and shall render them all necessary assistance.

**Inspection  
by Owner and  
Architect.**

**Other Me-  
chanics.**

#### THE OWNER'S AGREEMENT.

The Owner agrees to pay the Contractor the sum of..... dollars according to the following schedules and subject to the conditions hereinafter set forth : —

**Contract  
Price.**

The <i>First</i> payment to be	dollars (\$ )
.....	.....
The <i>Second</i> payment to be	dollars (\$ )
.....	.....
The <i>Third</i> payment to be	dollars (\$ )
.....	.....
The <i>Fourth</i> payment to be	dollars (\$ )
.....	.....
The <i>Fifth</i> payment to be	dollars (\$ )
.....	.....
The <i>Sixth</i> payment to be	dollars (\$ )
.....	.....
The <i>Seventh</i> payment to be	dollars (\$ )

**Payments.**

.....  
 .....  
 .....  
 And the *Balance* ..... dollars (\$) .....  
 thirty-five days after the completion of this contract .....  
 Total, \$ .....

**Conditions.**

Provided, however, that none of the foregoing payments shall be due or payable, unless the following conditions shall have been complied with : —

1. Unless the work to the stage in question has been done in the manner herein agreed, and there has been no breach by the Contractor of any of the provisions of this contract.
2. Unless the Contractor shall deliver to the Owner the written certificate of the Architect that the work to the stage in question has, in his opinion, been done in the manner herein agreed.
3. Unless (if the contract include excavations or mason-work on outside walls) the Contractor shall deliver to the Owner the written certificate of some competent surveyor to be selected by the Owner that there has been no encroachment upon adjoining public or private property.
4. Unless the property is free from all liens or right of lien for debts due or claimed to be due from the Contractor, and satisfactory evidence thereof furnished (if requested) to the Owner.

**ALTERATIONS AND EXTRAS.**

**Alterations  
not Increasing  
Cost.**

The Architect may in writing and from time to time order the Contractor to make any changes in the work which do not increase the cost to the Owner or affect the time of completion. In case said changes make the work less expensive to the Contractor, a proportional deduction shall be made from the contract price above specified. In no case shall any change be made in the work which shall increase the cost of the work to the Owner, or involve any extension of time, without his

express and special consent ; and, if the Contractor shall proceed to execute such change without first obtaining such consent, he shall be concluded against making any extra charge for the said change or any claim for further time.

In case of any change ordered by the Architect as aforesaid, or in case any other changes in the work are made by the mutual consent of the parties hereto, whether affecting the contract price or not, or the time of completion or not, all and singular the other provisions of this contract shall remain in force and apply to the contract as thus altered.

**Other Con-  
ditions to Re-  
main.**

#### ORDERS.

If any orders are accepted by the Owner (and it is understood that he shall be under no obligation to accept any), such acceptances shall be conditional on the due performance by the Contractor of all and singular the provisions of this contract, and subject to alterations as aforesaid.

**Orders.**

#### THE ARCHITECT.

The Architect mentioned in this contract is understood to be .....of ....., or such other Architect as the Owner may hereafter select ; any change to be notified to the Contractor in writing.

**Name.**

The Architect shall have authority to enter and inspect the work at all times, to reject all material (whether set up or not) and to condemn all work which in his opinion is not in conformity with the provisions of this contract, and to do all the things hereinbefore set forth as within his powers. Neither the Architect nor any person employed by him shall have any control or direction over the progress of the work, except the power of rejecting it, nor any control or superintendence over the scaffolding, apparatus, ways, works, machinery, or plant, the sole responsibility for which shall rest with the Contractor ; and neither of them shall have power to order extras or alterations, except as above provided, or any authority other than that expressly set forth in this contract. The Architect shall not be deemed the agent of the Owner for any purpose

**Powers.**



whatsoever, except as the Owner may in fact give him a special and express authority.

MISCELLANEOUS PROVISIONS.

**Waiver.**

No payment of money under this contract nor any acceptance or possession taken of the work done by the Contractor nor any certificate given shall be evidence of the performance of this contract or be construed as a waiver of any of its provisions by the owner; nor shall any waiver of any breach of this contract be held to be a waiver of any other or subsequent breach.

**Strikes and other Delays.**

If, in the opinion of the Architect, the Contractor is obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of any other contractor or by any damage which may happen thereto by fire or by the unusual action of the elements or by the abandonment of the work by the employes in a general strike, then the Contractor shall be entitled to such extension of the time specified above for the completion of the work as the Architect shall in writing certify; provided, however, that claim is made by the Contractor at the time and in writing.

**Default by Contractor.**

If at any time before the completion of this contract the Contractor becomes bankrupt or insolvent, or makes an assignment for the benefit of creditors, or assigns this contract or sublets any part of it without the consent of the Owner first obtained in writing, or becomes incapable of completing the contract, or shall at any time for six days refuse or neglect to proceed with the contract work in the manner herein agreed to the satisfaction of the Architect, then the owner may at once terminate this contract by a written notice delivered to the Contractor in person or at his usual place of business, and proceed to complete the work with other mechanics or contractors, and account to the Contractor or his legal representatives as follows: the Owner shall be credited with all payments theretofore made by him to the Contractor, with the entire cost of completing the work with said other mechanics and contractors, and

with all damages by delay or otherwise caused by the default of the Contractor, including reasonable expenses of counsel. If the contract price exceeds the total amount of these credits, the excess shall be paid to the Contractor or his legal representatives. In case orders accepted by the Owner are outstanding, the holders thereof shall be entitled to such excess in preference to the Contractor or his legal representatives. If, however, the total amount of the said credits exceeds the contract price, the excess shall be due from the Contractor to the Owner. In such accounting, the Owner shall not be held to obtain the lowest figures for the work of completing the contract; but all sums actually paid by him for such completion shall be credited to him.

All material delivered at the building by or on account of the Contractor, and intended to be incorporated with the building, shall become the property of the Owner as delivered; but the Contractor may repossess himself of any surplus left at the completion of the contract. All scaffolding, apparatus, ways, works, machinery, and plant brought upon the premises by the Contractor, or used by him, shall remain his property; but, in case of default and a completion of the contract work by the Owner, the latter shall be entitled to use the said scaffolding, apparatus, ways, works, machinery, and plant without cost or liability for depreciation or injury by use.

If the Owner does not make the payments herein provided as and when the same shall become due and payable, he shall be liable to the Contractor for interest on the same; and if such default continues for a period of ten days, the Contractor may, by a written notice delivered to the Owner in person or at his usual place of business, terminate this contract. But the acceptance of any money under this contract subsequent to such default shall operate as a waiver thereof and of the right to terminate this contract by reason thereof.

The Owner shall keep the building and the material on the premises insured against fire in such companies as he shall select, for the benefit of himself or any mortgagee and of any

**Property in  
Materials,  
etc.**

**Default by  
Owner.**

**Fire.**

and all contractors on the building who shall request such insurance in writing. The expense of said insurance shall be borne by the Owner ; but he shall not be responsible for carrying too little insurance, unless the Contractor has requested him in writing to insure in a certain specified amount, and the Owner has neglected to do so for an unreasonable length of time. In the event of a fire, the insurance money shall be divided between the Owner and any mortgagee and those Contractors for whose benefit the insurance was taken out, as their interests may appear ; and the parties hereto shall respectively proceed to the completion of this contract.

**Settlement  
of Disputes.**

All disputes arising out of this contract or the performance or breach thereof shall be settled by mutual agreement or in a court of law or equity before a single justice, auditor, or special master, and no claim shall be made for a trial by jury on the whole case or special issues.

In witness whereof, we the said.....  
and the said.....  
hereto set our hands and seals this.....day of.....18....

## INDEX.

---

- ABANDONMENT of Work, 202  
ACCEPTANCE by letter, 184  
ACCEPTANCE by telegraph, 185  
ACCEPTANCE, Contract by, 189  
ACCEPTANCE, Informal, 194  
ACCEPTANCE must be clear, 22  
ACCEPTANCE of proposal by architect, 189  
ACCUSATION of taking illicit commissions  
not libellous, 96  
ACTUAL damage only can be recovered,  
317  
ADVERTISEMENT, Contract through, 17  
ÆSTHETIC matters, Owner's wishes must  
be followed in, 65  
AGENCY, The Architect's, for the owner,  
365  
AGREEMENT not to be performed within a  
year, 215  
AGREEMENT or waiver, 278  
AGREEMENTS, Supplementary, 278  
ALTERATIONS, Right to order, 358  
ARBITRATION clauses, Objections to, 356  
ARCHITECT as agent for owner, General  
Rule, 81  
ARCHITECT cannot delegate his authority,  
93  
ARCHITECT cannot employ others to do  
contractor's work, 92  
ARCHITECT cannot give certificates to sub-  
contractors, 91  
ARCHITECT does not guarantee perfection  
of plan or perfection of building, 38  
ARCHITECT, Extensive authority of in his  
own province, 78  
ARCHITECT has no authority to change con-  
tract, 87  
ARCHITECT, How far can the—bind the  
owner? 81  
ARCHITECT, How far can the—go in in-  
specting concealed work? 86  
ARCHITECT, Importance of satisfying the,  
138  
ARCHITECT is bound to know the local  
building regulations, 64  
ARCHITECT must act fairly toward the  
builder, 131  
ARCHITECT must give certificate if re-  
quested, 161  
ARCHITECT must not consent to doubtful  
construction, 65  
ARCHITECT must not consider other  
accounts between owner and builder, 91  
ARCHITECT, Negligence of, a question of  
fact, not of law, 51  
ARCHITECT not a mere watchman, 51  
ARCHITECT not insurer of perfection in  
work, 50  
ARCHITECT not required to ascertain accu-  
racy of work, 34  
ARCHITECT not to be confounded with  
builder, 39  
ARCHITECT, Relation of to Commissioners,  
38  
ARCHITECT, Responsibility of, as dis-  
tinguished from that of builder, 73  
ARCHITECT, Satisfaction of, 356  
ARCHITECT to carry out employer's wishes,  
under certain restrictions, 64

- ARCHITECT**, Verbal orders of, 359  
**ARCHITECT**, Why the — should know something of law, 1  
**ARCHITECT's** agency for the owner, 355  
**ARCHITECT's** and builder's responsibility in France, 61  
**ARCHITECT's** contract a personal one, 126  
**ARCHITECT's** contract entire, 126  
**ARCHITECT's** duty to be ascertained by evidence, not by caprice of jury, 32  
**ARCHITECT's** employment, 2  
**ARCHITECT's** fault, Delay through, 185  
**ARCHITECT's** fees not properly a part of estimated cost, 70  
**ARCHITECT's** position in society, The, 28  
**ARCHITECT's** responsibility to the public, 74  
**ARCHITECT's** right to mechanic's lien, 121  
**ARCHITECT's** service, What is included in, 110  
**ARCHITECTS** and owners, 67  
**ARCHITECTS** as expert witnesses, 79  
**ARCHITECTS**, Authority of, derived from contract, 142  
**ARCHITECTS** in England, Great authority of, 135  
**ARCHITECTS** in the Napoleonic period, 57  
**ARCHITECTS** must be honest, 94  
**ARCHITECTS**, Salaried, 98  
**ARCHITECTS**, The methods of employing, 98  
**ARCHITECTS**, Skill and care required of, 28  
**ARTISTIC** goods, Special authority necessary for purchasing, 85  
**"AS DIRECTED,"** 262  
**AUTHORITY**, Architect cannot delegate his, 93  
**AUTHORITY**, Architect has no — to change contract, 87  
**AUTHORITY**, Architect exceeding his, — a French instance, 83  
**AUTHORITY**, Implied, in matters of construction, 82  
**AUTHORITY** of architect derived from contract, 142  
**AUTHORITY** of architect extensive in his own province, 78  
**AUTHORITY** of architects in England, 135  
**AUTHORITY** of superintendent extends to time when work shall be done, 78  
**AUTHORITY**, Special, necessary for purchasing artistic goods, 85
- 
- BUILDER** and owner, Relation between fixed by contract, 180  
**BUILDING** a house and performing work, Difference between, 353
- 
- CARE** of building, Responsibility for, 350  
**CARELESS** workmen, Dismissal of, 349  
**CERTIFICATE**, Architect must give if requested, 161  
**CERTIFICATE**, Decisions vary as to necessity for, 167  
**CERTIFICATE**, Final, really provisional, 177  
**CERTIFICATE**, Mere occupancy not waiver of, 179  
**CERTIFICATE** required for extra as well as contract work, 163  
**CERTIFICATE**, The, 158  
**CERTIFICATE**, Waiver of, 178  
**CERTIFICATES** and orders must be in form specified by the contract, 90  
**CERTIFICATES** to sub-contractors, Architects cannot give, 91  
**CHANGES** in contracts with corporations, 279  
**CHOICE** of a design, Terms of, 23  
**COLLUSION**, Courts of Equity will interfere in case of, 134  
**COLUMNS**, Raising of, 75  
**COLUMNS**, Thickness of, 87  
**"COMMENCEMENT,"** 261  
**COMMISSION**, Owner must state cost of building for computing, 112  
**COMMISSIONERS** and architect, Relation of, 38  
**COMMISSIONS**, Illicit, Accusation of taking not libellous, 96  
**COMMISSIONS** from contractor cannot be collected, 96  
**COMPENSATION** cannot be recovered from two persons for the same injury, 55  
**COMPENSATION**, Partial, recoverable in case of death, 126  
**COMPETITION**, Estimates in, 71  
**COMPETITION**, Strict adherence necessary to terms of, 18  
**COMPETITIVE** drawings, Value of, 26  
**COMPLETION**, Successive dates for, 350  
**COMPLIANCE** with local regulations, 350  
**CONCEALED** work, How far can an architect go in inspecting, 86  
**CONDITIONAL** acceptance of plans, 72  
**CONDITIONS**, Incompatible, 22
- 
- BRICK** house, A, 260

- CONSENT to sub-letting, 348  
 CONSIDERATION, The, 190  
 CONSTRUCTION, good, Exigencies of paramount, 64  
 CONSTRUCTION, Implied authority in matters of, 82  
 CONTRACT, Architect's, a personal one, 126  
 CONTRACT, Architect's, entire, 126  
 CONTRACT, Authority of architect derived from, 142  
 CONTRACT by acceptance of proposal, 189  
 CONTRACT by advertisement, 21  
 CONTRACT based on drawings used for estimating, 153  
 CONTRACT, Certificates and orders must be in form specified by the, 90  
 CONTRACT, Deductions from, 289  
 CONTRACT, Delivery of, 195  
 CONTRACT, Forfeited, may be reinstated, 309  
 CONTRACT, Formal, The, 351  
 CONTRACT, Forms of, 361  
 CONTRACT, Fraudulent, not binding, 218  
 CONTRACT may not be entirely vitiated by fraud, 220  
 CONTRACT not broken by delay, if builder pays penalty, 321  
 CONTRACT, Provision for interim payments does not affect entirety of, 230  
 CONTRACT, Relation between owner and builder fixed by, 180  
 CONTRACT, The lowest bidder not necessarily entitled to, 221  
 CONTRACT through advertisement, 17  
 CONTRACT, Uniform, 362  
 CONTRACT, Written, excludes verbal variations, 208  
 CONTRACT, Written, parol testimony admissible to supply deficiencies in, 271  
 CONTRACTOR, Death of, 308  
 CONTRACTOR should give notice on discovering mistake, 219  
 CONTRACTOR's debts cannot be assumed by public corporation, 203  
 CONTRACTOR's position where work is abandoned, 292  
 CONTRACTOR's warranty, 349  
 CONTRACTOR's work, Architect cannot employ others to do, unless authorized by contract, 92  
 CONTRACTORS, Commissions from cannot be collected, 96  
 CONTRACTS, Divisibility of according to their stipulations, 231  
 CONTRACTS, Enforcement of, 352  
 CONTRACTS, Entire and divisible, 228  
 CONTRACTS, Extras in public, 202  
 CONTRACTS for employment, 181  
 CONTRACTS, Implied, 182  
 CONTRACTS, Sealed, 191  
 CONTRACTS, Sunday, 217  
 CONTRACTS under seal, 279  
 CONTRACTS, What deviations are unintentional and inadvertent, 240  
 CONTRACTS, Wilful or careless departures from, 239  
 CONTRACTS with corporations and private individuals, Differences between, 196  
 CONTRACTS, Written, oral and implied, 180  
 CONTRACTS, Written, 181  
 CONTRIBUTORY misfeasance, 57  
 CORPORATE seal, Necessity for, 196  
 CORPORATION, public, cannot assume contractor's debts, 203  
 CORPORATION, public, not obliged to carry out its contracts, 204  
 Cost, "Estimated," means reasonable cost, 112  
 Cost, Limit of, may be agreed beforehand, 69  
 Cost, limit of, rules, where incompatible with effect desired, 66  
 Cost of building must be stated by owner, 112  
 Cost, What courts think about limit of, 69  
 Cost, What limit of ordinarily covers, 67  
 Cost, What is reasonable compliance with limit of, 68  
 COURTS of equity will interfere in case of collusion, 134  
 CUSTOMS, local, The courts on, 259
- 
- DAMAGE, Actual only can be recovered, 317  
 DAMAGES for delay, 317  
 DAMAGES for negligence, Measure of, 64  
 DAMAGES, Two theories of, The first theory, 99  
 DAMAGES, Two theories of, The second theory, 100  
 DAMAGES, Wages earned in other employment to be offset from, 103  
 DEATH of contractor, 308  
 DEATH of owner, 308  
 DECISIONS vary as to necessity for certificate, 167

- DEDUCTIONS from contract, 280  
 DEDUCTIONS, Uncertainty of, 177  
 DELAY by others' fault, 323  
 DELAY, Damages for, 317  
 DELIVERY of contract, 196  
 DEPARTURE from contract, wilful or careless, 239  
 DESIGN, Terms of choice of, 23  
 DETAIL and general drawings, Variations between, 146  
 DEVIATIONS from contract, What are unintentional and inadvertent, 240  
 DIFFERENCE between building a house and performing work, 363  
 DIFFERENCE between contracts with corporations and private individuals, 196  
 DIGESTS of mechanic's lien laws unreliable, 344  
 DISCHARGE, Wrongful, 99  
 DISMISSAL of careless workmen, 349  
 DIVISIBLE and entire contracts, 228  
 DIVISIBILITY of contracts according to their stipulations, 231  
 DOUBTFUL construction, Architect must not consent to, 65  
 DRAINING quicksand, 209  
 DRAWINGS as written orders, 146  
 DRAWINGS for the Houses of Parliament, The, 129  
 DRAWINGS not equivalent to written order in Massachusetts, 151  
 DRAWINGS not included in superintendence, 111  
 DRAWINGS, Ownership of, 128  
 DRAWINGS, The French law, 129  
 DRAWINGS used for estimating, Contract based on, 153  
 DRAWINGS, Variations between detail and general, 146  
 DUTY of architect to be ascertained by evidence, 32
- 
- EARTH excavation, 263  
 EMPLOYER's liability, How to guard owners against, 360  
 EMPLOYER's wishes to be carried out by architect under certain restrictions, 64  
 EMPLOYMENT of architect, 2  
 EMPLOYMENT, Contracts for, 181  
 EMPLOYMENT, Person employed must keep to terms of, 105  
 ENFORCEMENT of contracts, The, 352
- ENGAGEMENT for services not to be completed within a year, 3  
 ENTIRE and divisible contracts, 228  
 ENTIRETY of contract not affected by provision for interim payments, 230  
 EQUEERRY, An, as a building expert, 44  
 EQUITY courts will interfere in case of collusion, 134  
 "ERECTION," 262  
 ESTIMATED cost, Architect's fee not properly a part of, 70  
 ESTIMATED cost means reasonable cost, 112  
 ESTIMATES in competition, 71  
 ESTIMATES, Inevitable uncertainty of, 68  
 EXCAVATION, Earth, 263  
 EXIGENCIES of good construction paramount, 64  
 EXPERT Witnesses, Architects as, 79  
 EXTENSIVE authority of architect in his own province, 78  
 EXTRAS, Danger to architects in ordering artistic, 84  
 EXTRAS ordered by architect, 143  
 EXTRAS, Verbal orders for, 285  
 EXTRA work, Certificates required for, 163  
 EXTRA work, Price for, 289  
 EXTRA work, The claim to pay for, 108
- 
- FEE for partial service based on fee for full service, 120  
 FEES, Architects', not properly a part of estimated cost, 70  
 FEES, Schedule, 113  
 FEES, Schedule, What notice necessary, 114  
 FINAL certificate really provisional, 177  
 FIVE per cent rule, 113  
 FORFEITED contract may be reinstated, 309  
 FORFEITURES and liquidated damages, 318  
 FORMAL contract, The, 351  
 FORMS of contract, 361  
 FRAUD may not entirely vitiate contract, 220  
 FRAUDS, Statute of, 213  
 FRAUDULENT bidding dangerous, 227  
 FRAUDULENT contract not binding, 218
- 
- GENERAL conditions, 345  
 GENERAL conditions prefixed to specifications, 188

HONORABLE practice, The public idea of, 95  
 HOUSE, A brick, 260  
 HOUSES of Parliament, Drawings for, 129  
 How far can the architect bind the owner, 81  
 How far can the architect go in inspecting concealed work, 86  
 How soon proposal must be accepted, 183  
 How to guard owners against employer's liability, 360

IMPLIED agreements for changes, 280  
 IMPLIED authority in matters of construction, 82  
 IMPLIED contracts, 182  
 INCOMPATIBLE conditions, 22  
 INDIVIDUAL officials, Liability of, 204  
 INEVITABLE uncertainty of estimates, 68  
 INSPECTING concealed work, 86  
 INSURANCE clause in contracts, 361  
 INTELLIGENCE, Servant must show, 108  
 INTERIM payments, Provision for does not affect entirety of contract, 230  
 IOWA, The law in, 54

LEGAL structures, The responsibility for the failure of, 210  
 LIABILITY, employer's, How to guard owners against, 360  
 LIABILITY of individual officials, 204  
 LIEN, Limit of claim in mechanic's, 125  
 LIEN, Mechanic's, Right of architect to, 121  
 LIMIT of claim in mechanic's lien, 125  
 LIMIT of cost may be agreed beforehand, 69  
 LIMIT of cost, Reasonable compliance with, 68  
 LIMIT of cost rules, where incompatible with effect desired, 66  
 LIMIT of cost, What courts think about, 69  
 LIMIT of cost, What it ordinarily covers, 67  
 LIQUIDATED damages, Forfeiture and, 318  
 LOCAL customs, The courts on, 259  
 LOCAL regulations, Compliance with, 350

MAINE, Statute of Frauds of, 213  
 MANTELS, Tiles, etc., 85

MATERIALS, Old, 265  
 MATERIALS, What is implied in regard to, 264  
 MEASURE of damages for negligence, 54  
 MEASUREMENT, Plasterers', 260  
 MECHANIC's lien laws, Digests of unreliable; 344  
 MECHANIC's lien, Limit of claim in, 125  
 MECHANIC's lien, Right of architects to, 121  
 MERE occupancy not waiver of certificate, 179  
 METHODS of employing architects, 98  
 MISFEASANCE, Contributory, 57  
 MISTAKE, Contractor should give notice on discovering, 219  
 "MORE or less," 267

NAPOLEONIC period, Architects in the, 57  
 NATURAL bed, 266  
 NECESSITY for certificate, Decisions vary as to, 167  
 NEGLIGENCE, Measure of damages for, 54  
 NEGLIGENCE of architect a question of fact, not of law, 51  
 NON-MEMBER of Institute, Schedule usages valid for, 115  
 "NOT less," 263

OBJECTIONS to arbitration clauses in contracts, 356  
 OCCUPANCY does not imply acceptance, 314  
 OCCUPANCY not waiver of certificate, 178  
 OFFER, Withdrawal of, 185  
 OLD materials, 265  
 ONE party only, Signature by, 192  
 ORDERS, 274  
 ORDERS, Verbal, of the architect, 359  
 OTHER accounts between owner and builder not to be considered by architect, 91  
 OTHERS, Delay by fault of, 323  
 OWNER, Death of, 308  
 OWNER, How far can the architect bind the, 81  
 OWNER, How to guard against employer's liability, 360  
 OWNER must state cost of building, 112  
 OWNER, Plans paid for by, 111  
 OWNER and builder, Relation between fixed by contract, 180



- OWNERS and architects, should have better understanding, 67
- OWNER's general agent, Deposit of money in architect's hands does not make him, 86
- OWNER's wishes must be followed in æsthetic matters, 65
- OWNERSHIP of drawings, 128
- 
- PAROL testimony admissible to supply deficiencies, 211
- PARTIAL compensation recoverable in case of death, 126
- PARTIAL service, Fees for, 115
- PAYMENT on entire contract not due until completion, 229
- PERSONAL, Contract with architect is, 126
- PILING not shown on plans, 149
- PLANS, Conditional acceptance of, 72
- PLANS paid for by owner, 111
- PLASTERER's measurement, 360
- "PLASTERING," 267
- POSITION of contractor when work is abandoned, 292
- PREMIUMS, 325
- PRICE for extra work, 289
- PROPOSAL, Acceptance of by architect for the owner, 189
- PROPOSAL, Acceptance of by letter, 184
- PROPOSAL, Acceptance of by telegraph, 185
- PROPOSAL and acceptance, 183
- PROPOSAL by advertisement, 21
- PROPOSAL, Informal acceptance of, 194
- PROPOSAL must be accepted as made, 186
- PUBLIC corporation not obliged to carry out its contracts, 204
- 
- QUANTITIES, 268
- QUANTUM Meruit, 177
- QUICKSAND, Draining, 209
- 
- RAISING of Columns, 75
- REASONABLE compliance with limit of cost, 68
- REASONABLE skill and care, What are, 29
- REGULATIONS, Local, Compliance with, 350
- RELATIONS between owner and builder fixed by the contract, 180
- RELATION of commissioners and architect, 38
- RESPONSIBILITY between architect and contractor, Solidarity of, 62
- RESPONSIBILITY for care of building, 350
- RESPONSIBILITY for variations, 288
- RESPONSIBILITY, Legal principles modifying, 77
- RESPONSIBILITY of architect and builder in France, 61
- RESPONSIBILITY of architect, as distinguished from that of builder, 73
- RESPONSIBILITY of the architect for the correctness of his certificates, 76
- RESPONSIBILITY of the architect to the public, 74
- RESPONSIBILITY for the failure of legal structures, 210
- RIGHT to order alterations, 358
- ROOF-TIMBERS, Rotting of, 58
- 
- SALARIED architects, 98
- SAND, 265
- SATISFACTION, The, of the architect, 355
- SCHEDULE, as evidence of custom, not favored by the courts, 113
- SCHEDULE customs, Question to be raised with caution, 118
- SCHEDULE fees for partial service, 115
- SCHEDULE fees reasonable in amount, 113
- SCHEDULE fees, — the five per cent rule, 113
- SCHEDULE fees, what notice is necessary, 114
- SCHEDULE rates often favor client, 119
- SCHEDULE, The, in court, 45
- SCHEDULE usages valid for non-members of the Institute, 115
- SCHEDULE valid where known to client, 114
- SEAL, Contracts under, 279
- SEALED contracts, 191
- "SEE to it," Meaning of, 43
- SERVANT must show intelligence, 108
- SERVANT, The wrongful discharge of a, 99
- SERVICE, Architect's, What is included in, 110
- SERVICE, Volunteered, 25
- SIGNATURE by one party only, 192
- SIGNATURE, What may be taken as a, 5
- SIGNATURES, 192
- SIGNATURES, Party signing is bound, 194
- SKILL and care required of architects, 28
- SPECIFICATION controls drawings, 161

- SPECIFICATION, Discrepancies in, 154  
 SPECIFICATIONS, General conditions pre-  
   fixed to, 188  
 "SPECIFICATIONS hereto annexed," 270  
 STATUTE of Frauds of Maine, 213  
 SUB-CONTRACTORS, 276  
 SUB-CONTRACTORS, Architects cannot give  
   certificates to, 91  
 SUB-LETTING, Consent to, 348  
 SUCCESSIVE dates for completion, 350  
 SUNDAY contracts, 217  
 SUPERINTENDENCE, Drawings not included  
   in, 111  
 SUPERINTENDENT, Authority of, 78  
 SUPPLEMENTARY agreements, 278
- 
- TERMS of choice of a design, 23  
 TESTIMONY, Parol, admissible to supply  
   deficiencies, 211  
 THE claim to pay for extra work, 108  
 THE failure of legal structures, Responsi-  
   bility for, 210  
 THE formal contract, 351  
 THE law in Iowa, 54  
 THE public idea of honorable practice, 96  
 THICKNESS of metal in columns, 87  
 TILES, mantels, etc., 85  
 TIME, Extension of, 22  
 TIME-BOOK, Value of, 118  
 TINNING, 274  
 TRANSPORTATION to be paid for by con-  
   tractor, 348  
 Two theories of damages, 99
- 
- UNCERTAINTY in contracts to be avoided,  
   357  
 UNCERTAINTY of deductions to be made, 177
- UNCERTAINTY of estimates inevitable, 68  
 UNIFORM contract, 362
- 
- VALUE of competitive drawings, 26  
 VARIATION between detail and general  
   drawings, 146  
 VERBAL orders of the architect, 359  
 VERBAL orders for extras, 285  
 VOLUNTEERED service, 25
- 
- WAGES earned in other employment offset  
   from damages, 103  
 WAIVER by implication, 286  
 WAIVER of certificate, 178  
 WAIVER of one stipulation does not affect  
   the others, 323  
 WALL, A, as a wild animal, 340  
 WARRANTY, contractor's, 349  
 WARRANTY of roof, 271  
 WHAT is implied in regard to materials, 264  
 WHAT is included in architect's service, 110  
 WILFUL or careless departure from con-  
   tract, 239  
 WITHDRAWAL of offer, 185  
 WORKMEN, Careless, Dismissal of, 349  
 WRITTEN, Contract by advertisement is, 21  
 WRITTEN contract excludes verbal varia-  
   tions, 208  
 WRITTEN contracts, 181  
 WRITTEN, oral and implied contracts, 180  
 WRITTEN orders, Drawings as, 146  
 WRONGFUL discharge, 99
- 
- YEAR, Agreement not to be performed  
   within a, 215





14 DAY USE  
RETURN TO DESK FROM WHICH BORROWED

**LOAN DEPT.**

This book is due on the last date stamped below, or  
on the date to which renewed.

Renewed books are subject to immediate recall.

4 Mar '63 WS

REC'D LD

FEB 18 1963

DUE NRLF MAR 26 1985

MAY 15 1986

AUTO DISC JUL 15 '88

MAR 11 1998

LD 21A-50m-11.'62  
(D3279s10)476B

General Library  
University of California  
Berkeley

YU 02764

GENERAL LIBRARY - U.C. BERKELEY



8000916079



300 024 237

